CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1929

No. 232

THE HOME INSURANCE COMPANY AND FRANKLIN FIRE INSURANCE COMPANY, APPELLANTS,

vs.

C. J. DICK, TEXAS & GULF STEAMSHIP COMPANY, AND SUDERMAN & YOUNG, INC.

APPEAL FROM THE SUPREME COURT OF THE STATE OF TEXAS

FILED JULY 11, 1929

(34,363)

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INDEX

	Original	Print
Proceedings in supreme court of Texas	1	1
Precipe for transcript of record....(omitted in printing)..	1	
Caption.....(omitted in printing)..	3	
Record from district court of Galveston County, case No. 39,643	4	1
Caption.....(omitted in printing)..	4	
Petition	5	1
Order appointing attorney for defendant	7	3
Answer	8	3
Plaintiff's general demurrer	11	6
Judgment, notice of appeal, etc	12	7
Findings of fact and conclusions of law	14	8
Bond on appeal.....(omitted in printing)..	17	
Assignments of error.....(" " ")..	25	
Agreement re transcript, etc....(" " ")..	27	
Bills of costs.....(" " ")..	28	
Clerk's certificate.....(" " ")..	30	

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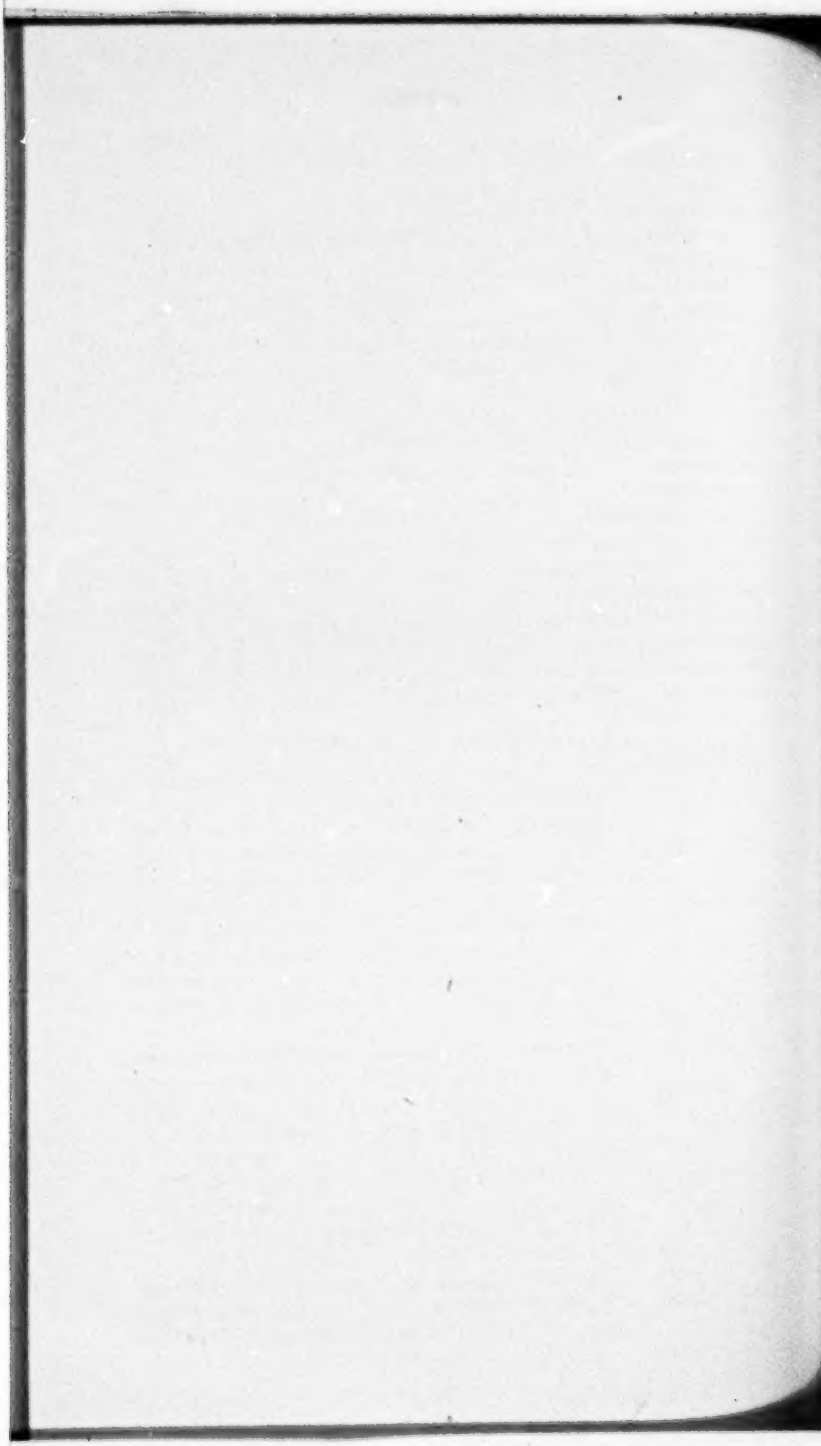
	Original	Print
Record from district court of Galveston County, case No. 39,645	31	11
Caption.....(omitted in printing)..	31	
Affidavit for garnishment	32	11
Order granting Texas & Gulf Steamship Co. and Suderman & Young leave to intervene for their interest	33	12
Intervention of Texas & Gulf Steamship Co. and Suderman & Young	33	12
Original answer of the Home Insurance Company	36	14
Original answer of the Franklin Fire Insurance Company	38	16
Controverting affidavit of plaintiff C. J. Dick	41	17
Controverting affidavit of plaintiff C. J. Dick	43	18
Answer of garnishees to plaintiff's controverting plea	45	20
Plaintiff's general demurrer	48	22
Judgment, notice of appeal, etc.	49	23
Findings of fact and conclusions of law	51	25
Appeal bond of defendant The Home Insurance Co. (omitted in printing)	54	
Appeal bond of defendant Franklin Fire Insurance Co. (omitted in printing)	61	
Garnishees' assignments of error	60	28
Agreement as to transcript, etc. (omitted in printing)	73	
Bills of costs.....(" " ")..	74	
Clerk's certificate.....(" " ")..	76	
Statement of facts, consolidated	77	32
Testimony of Charles J. Dix (omitted in printing)	77	
Testimony of H. C. Dix.....(omitted in printing)..	80	
Exhibit 1—Outside of original policy	91	32
Exhibit 2—Binder on insurance policy (omitted in printing)	91	
Stipulation re exhibits, etc. (omitted in printing)	92	
Exhibit—Translation of original policy	94	32
Testimony of C. J. Dick....(omitted in printing)..	110	
Exhibit No. 4—Survey on ship (omitted in printing)	120	
Reporter's certificate.....(omitted in printing)..	121	
Testimony of William B. Edgar (omitted in printing)	122	
Exhibit—Survey on ship (Dyer) (omitted in printing)	127	
Exhibit—Survey on ship (Taylor) (omitted in printing)	128	
Exhibits—Correspondence (omitted in printing)	132	
Testimony of C. J. Dick....(omitted in printing)..	142	
Reporter's certificate.....(omitted in printing)..	143	
Agreement re statement of facts (omitted in printing)	144	

	Original	Print
Order approving statement of facts (omitted in printing)	144	
Record from court of civil appeals of Texas	145	42
Appellants' brief (omitted in printing)	145	
Judgments	176	42
Opinion, Graves, J.	178	43
Motion for rehearing (omitted in printing)	194	
Order denying rehearing	199	56
Petition for writ of error	200	56
Order denying writ of error	219	72
Motion for rehearing	220	73
Order granting rehearing and writ of error	224	75
Judgment	225	76
Opinion, Critz, J.	226	77
Motion for rehearing (omitted in printing)	234	
Order denying rehearing	238	83
Petition for appeal	238	84
Order allowing appeal	247	90
Assignments of error	248	91
Stipulation re bond (omitted in printing)	251	
Bond on appeal (" " ")	252	
Citation and service (" " ")	254	
Clerk's certificate (" " ")	256	
Statement of points to relied upon and designation of parts of record to be printed	257	93



[fols. a-4] [Captions omitted]

[fol. 5]

IN DISTRICT COURT OF GALVESTON COUNTY

No. 39643

C. J. DICK

vs.

COMPANIA GENERAL ANGLO-MEXICANA DE SEGUROS, S. A.

ORIGINAL PETITION—Filed Oct. 27, 1923

The plaintiff, C. J. Dick, complaining of the defendant, Compania General Anglo-Mexicana de Seguros, S. A. would show to the Court that the plaintiff is a resident citizen of Galveston County, Texas, while the defendant is a corporation duly incorporated under the laws of the Republic of Mexico, and a non-resident of the State of Texas, but with property, assets and effects within reach of the jurisdiction of this Court.

For cause of action herein, plaintiff alleges that he heretofore, to-wit, on or about the 18th day of March, 1921, he was, as the lawful custodian, in possession of a certain vessel and tugboat known as the R. Waverly (sometimes known and referred to as the Waverly R.) and in which said vessel the plaintiff had a beneficial and insurable interest; that about the date hereinabove set forth said vessel was being used in and around the waters of the harbor of Tampico in the Republic of Mexico, and the plaintiff desired that the same be insured; that on the 18th day of March, 1921, the defendant, acting by and through its duly authorized agents, insured the aforesaid vessel, the R. Waverly, its tackle, apparel, equipment, etc. for a valuable consideration by policy 18,098, against sinking and burning, in the sum of $35,000.00 in the name of Charles B. Bonner of Tampico, but for the benefit of and loss, if any, payable to the plaintiff and to the Texas & Gulf Steamship Company, as their interest might appear which said insurance was in force from noon on March 18, 1921, to noon on March 18, 1922;

[fol. 6] That, later, the interest of Charles B. Bonner in said policy was transferred to one A. W. Turner of Tampico, Mexico, and on July 18, 1921, the entire interest of said A. W. Turner in said policy was transferred to the plaintiff;

That thereafter, and on or about the — day of July, 1921, said vessel, the R. Waverly, caught fire and was burned to such an extent as to cause her to sink in the harbor at Tampico, Mexico, and said vessel became thereby, and was, a total loss; that plaintiff has made proper proof of said loss and has delivered said proof to the defendant; that by reason of the facts herein alleged, the defendant became liable and promised to pay plaintiff the full amount of said policy, and plaintiff has made due demand for the payment of said policy from said defendant; that in spite of all the facts herein alleged, the plaintiff has denied and now denies any liability whatever in this connection, and has refused to make any kind of payment whatever on account of the loss hereinabove referred to, although liable to the plaintiff to the full extent of said policy and interest;

That by reason of all the premises, plaintiff has been damaged in the full sum of $35,000.00, with lawful interest on said claim from the first day of August, 1921;

Wherefore, plaintiff prays for citation by publication herein, garnishment proceedings having been commenced contemporareonsly herewith, and that upon due return of said citation he have judgment for his debt, as hereinabove alleged; costs of suit and such other and further relief as he may show himself entitled to in law or in equity.

H. C. Hughes, Attorney for Plaintiff.

[fol. 7] The State of Texas,
County of Galveston:

C. J. Dick, the plaintiff, being first duly sworn, on oath deposes and says: that the Compania Anglo Mexicana De Surkuros S. A., is a corporation duly organized under the laws of Mexico, and that said corporation is a non-resident of the State of Texas. Wherefore, he prays for citation by publication.

C. J. Dick.

Sworn to and subscribed before me this 27th day of Oct., A. D. 1923. W. E. Price, Notary Public in and for Galveston County, Texas.

[File endorsement omitted.]

In District Court of Galveston County

No. 39643

[Title omitted]

Order Appointing Attorney to Represent Absent Defendant

It is ordered by the Court that Ballinger Mills, Esq., a practicing attorney of this Court be and he is hereby appointed by the court to represent the absent defendant herein who has been duly cited by publication and who has failed to appear or answer in this cause.

[fol. 8] In District Court of Galveston County

No. 39643

[Title omitted]

Original Answer—Filed Jan. 14, 1927

Now comes the defendant in the above numbered and entitled cause, acting by and through Terry Cavin & Mills, Attorneys heretofore appointed by this court to represent it, and without waiving any defects in the service hereof, and without any appearance herein, except by said attorneys appointed by the court, answers plaintiff's petition herein filed, and respectfully shows to the court:

Defendant excepts and demurs to plaintiff's petition herein filed, and says that the same is insufficient in law and shows no cause of action against it, and of this the judgment of the court is prayed.

Terry, Cavin & Mills, Attorneys for said Defendant.

And for answer herein, if required, defendant denies each and every, all and singular, the allegations in plaintiff's petition contained, and demands strict proof thereof and of this it puts itself upon the country.

Terry, Cavin & Mills, Attorneys for said Defendant.

Specially pleading herein, if required, defendant says that plaintiff ought not to have or maintain this suit against it, because the policy of insurance mentioned in and declared upon by plaintiff's original petition, contained a stipulation and provision reading as follows:

"It is understood and agreed that no judicial suit or demand shall be entered before any tribunal for the collection of any claim under this policy, unless such suits or demands are filed within one year counted as from the date on which such damage occurs."

[fol. 9] That said policy was issued in the Republic of Mexico and that the above quoted provision thereof was and is valid and enforceable under the laws of the Republic of Mexico, and that the said contract was performable and intended to be performed in Mexico, and the clause above quoted is and was valid as a defense to any suit brought to recover on said policy after the expiration of one year from the date of the accrual of the cause of action or damage to the vessel mentioned in plaintiff's petition; that this suit was not filed within one year from and after the accrual of said cause of action and this defendant here now specially pleads said fact and the said provision and stipulation of said policy in bar of plaintiff's right of action herein and prays that this suit be dismissed.

Terry, Cavin & Mills, Attorneys for Defendant.

And for further and special answer herein, if required, this defendant alleges that the contract sued on by plaintiff herein was made in the Republic of Mexico and intended to be performed in the Republic of Mexico, and was subject to the laws of the said Republic of Mexico, which contain certain provisions in Articles 1038, 1039 and 1043, of the Commercial Code of the Republic of Mexico, which was in force at the time of the issuance of said policy, and at the time of the accrual of plaintiff's cause of action herein, and which read as follows:

Article 1038. "The rights of action derived from commercial acts shall be subject to prescription in accordance with the provisions of this Code."

Article 1039. "The periods fixed for the enforcement of rights of action arising out of commercial acts shall be fatal except restitution against same is given."

[fol. 10] Article 1043. "One year shall prescribe actions derived from contracts of life insurance, sea and land."

That under and by virtue of the above quoted provisions of the Mexican laws, any cause of action such as that asserted by the plaintiff herein is and was barred if no suit was instituted thereon within one year from the date of the accrual thereof, and this defendant here now specially pleads that this suit was not instituted within such one-year period, and pleads such fact and the provisions of the said commercial code of the Republic of Mexico in bar of this suit, and prays that this suit be dismissed.

Terry, Cavin & Mills, Attorneys for Defendant.

This defendant further specially pleads that the policy declared on by plaintiff herein was void from the inception because it was then represented to the defendant that the value of the vessel alleged to have been insured thereby was in excess of the amount of such policy, and defendant alleges that in fact said representations of plaintiff were not true, and the value of said vessel was not as much as the amount of such policy.

Defendant stands ready to verify the foregoing.

Terry, Cavin & Mills, Attorneys for Defendant.

Defendant further pleading, alleges that the said vessel was not a total loss, and that notwithstanding such fact, the said vessel was abandoned by the plaintiff without notice to this defendant, in violation of the terms of the policy, and that it was the duty of the plaintiff, under the terms of the said policy, to repair said vessel at the cost and expense of defendant, and defendant is liable, if at all, only for the cost of such repairs, and not for the face of such policy.

[fol. 11] Defendant stands ready to verify the foregoing.

Terry, Cavin & Mills, Attorneys for Defendant.

[File endorsement omitted.]

In District Court of Galveston County

[Titles omitted]

Plaintiff's General Demurrer—Filed July 26, 1927

Now comes the plaintiff, C. J. Dick in the above entitled and numbered causes and demurs generally to the answer of the defendant and the garnishees herein and says that said answers show no defense to his cause of action and prays judgment of the court.

Further and specially demurring herein, plaintiff says that that part of the answer of the defendant and the garnishees which undertakes to set up a contractual limitation and which undertakes to set up the limitation of the Republic of Mexico fail to show any defense to the cause of action herein and should be stricken out.

(a) Because the portions alleged in said answer as being contained in said policy do not form a portion of the cause of action.

[fol. 12] (b) Because the statute of the State of Texas prohibits a contractual limitation of less than two years.

(c) Because said matters are in violation of the public policy of the State of Texas and void in this court.

Wherefore plaintiff prays that said parts of the answer be stricken out and held for naught.

Not waiving the foregoing demurrers, but relying thereon this plaintiff denies all and singular the allegations in the answer of the above named defendant and garnishees contained.

H. C. Hughes, Williams, Neethe & Williams, Attorneys for Plaintiff and Intervenors.

[File endorsement omitted.]

In District Court of Galveston County

No. 39643

C. J. Dick

vs.

Compania General Anglo-Mexicana De Seguros, S. A.

Judgment, Notice of Appeal, etc.—July 26, 1927

On this the 26th day of July, 1927, came on to be heard the above entitled and numbered cause, and there appeared the plaintiff therein C. J. Dick in person and by his attorneys, and also appeared the intervenors Texas & Gulf Steamship Company and Suderman & Young, Inc., in person and by their attorneys, and there appeared the defendant Compania General Anglo-Mexicana de Seguros, S. A., a corporation, which is a non-resident of this State and which was duly cited by publication, by the attorneys heretofore appointed herein by the Court, Messrs. Terry, Cavin & Mills, to represent said defendant; and a jury having been waived and the parties having agreed to sub-
[fol. 13] mit all matters in controversy between them to the Court for determination; and the Court having heard the evidence and the argument of counsel, is of the opinion that the law is with the plaintiff and the intervenors herein. It is therefore ordered, adjudged and decreed that the plaintiff herein C. J. Dick do have and recover of and from the defendant the sum of Seventeen Thousand Five Hundred and Eigthy-seven and 50/100 Dollars ($17,587.50), and that said intervenors herein Texas & Gulf Steamship Company, a corporation, and Suderman & Young, Inc., do have and recover against the said defendant the sum of Nineteen Thousand and Eighty Seven Dollars and Fifty Cents ($19,-087.50), together with costs in this behalf incurred, said sums having been brought within the jurisdiction of this Court by writs of garnishment duly issued in cause No. 39,645, entitled C. J. Dick vs. The Home Insurance Co. and the Franklin Fire Insurance Company, garnishees of Compania Anglo-Mexicana de Seguros, S. A. defendant herein. It is further ordered, adjudged and decreed that no execution or other process shall ever issue on this judgment ex-

cept in so far as the same may be enforced against property and assets now within the jurisdiction of this Court. It is further ordered, adjudged and decreed that the sum of Two Hundred Fifty Dollars ($250.00) be taxed as part of costs in this case in favor of Terry, Cavin & Mills, heretofore appointed attorneys to represent the defendant cited by publication and that all costs in this cause are to be deducted from the recovery of the plaintiff and intervenors herein. To which judgment, order and decree the defendant, Compania General Anglo-Mexicana de Seguros, S. A. duly excepted and in open court gave notice of appeal to the Court of Civil Appeals for the First Supreme Judicial Dis-
[fol. 14] trict of Texas at Galveston and ninety (90) days from and after the adjournment of this Court is allowed said defendant for the filing of statements of acts and bills of exception herein.

IN DISTRICT COURT OF GALVESTON COUNTY

[Titles omitted]

FINDINGS OF FACT & CONCLUSIONS OF LAW—Filed July 26, 1927

Findings of Fact

I

I find that on the 18th day of March, 1921, the defendant, the Compania General Anglo-Mexicana de Seguros, S. A. issued its policy No. 18098 to Charles B. Bonner of Tampico, Mexico, wherein said company insured the tug R. Waverly also known as Waverly R., for a period of one year from the last named date, for the sum of Thirty-five Thousand ($35,000.00) Dollars, the loss or damage under said policy being payable to the Texas & Gulf Steamship Company and C. J. Dick, as their respective interests might appear; and that the defendant received from the parties interested the full amount of premium demanded for the issuance of said policy.

[fol. 15]

II

I find that on May 24th, 1921, all the right of Charles B. Bonner in said policy was transferred to A. W. Turner, and that on July 18th, 1921, all the rights of A. W. Turner in said policy were transferred to and solely vested in the plaintiff, C. J. Dick.

III

I find that the plaintiff C. J. Dick, had a beneficial and insurable interest in said vessel, and that said policy hereinabove described, as originally issued was for the benefit of the plaintiff, C. J. Dick, and the Texas & Gulf Steamship Company, according to the respective interests of said parties in said vessel. That thereafter Sunderman & Young, Inc., acquired an interest in said policy or the proceeds thereof. I find that while said policy was in full force and effect, and on the 27th day of July, 1921, the vessel insured under the policy hereinabovedescribed, took fire and was burned and sunk in the harbor of Tampico, Mexico, and thereby became and was a total loss, said facts being made known to the insurance company by the proof of total loss required by the policy.

V

I find that on the 29th day of March, 1921, the duly authorized agents of the Home Insurance Company and the Franklin Fire Insurance Company in Mexico City issued notices to said companies that each of them was bound for re-insurance in the sum of Fifteen Thousand ($15,000.00) Dollars under the policy No. 18098, and that said notices of re-insurance and the premiums for same were accepted and acted upon by the Home Insurance Company and the Franklin Fire Insurance Company.

VI

I also find that the plaintiff and intervenors have demanded payment of the defendant, and that no payment has ever been made.

[fol. 16] VII

I find that C. J. Dick, the plaintiff, left Mexico where he was temporarily sojourning, within about ten days after the total loss of the R. Waverly, and that he has never at any time been a permanent resident of the Republic of Mexico, but that he has at all times been a resident citizen of the State of Texas.

VIII

I find that garnishments were issued in cause No. 39645 and that there is now in the hands of each of the garnishees The Home Insurance Company and the Franklin Fire Insurance Company, Fifteen Thousand ($15,000.00) Dollars, making a total sum of Thirty Thousand ($30,000.00) Dollars belonging and due to the original defendant, Compania General Anglo-Mexicana De Seguros S. A., in the hands of said garnishees, together with interest on said sum from December 3, 1923, on which date the garnishees filed their answers in garnishment wherein they denied that they were indebted to the original defendant, Compania General Anglo-Mexicana de Seguros, S. A.

Conclusions of Law

I

I conclude as a matter of law that by reason of the policy and the total loss of said vessel, and the proof of same, the plaintiff and those entitled thereto in connection with the plaintiff should have judgment for the amount of money brought within the jurisdiction of this Court by garnishments issued in cause No. 39,645.

II

I further conclude that the plaintiff and the intervenors, they having agreed among themselves as to the amounts due between them, should have judgment against the garnishees for the sum sequestered by garnishment, and which said sum is found to be due from the garnishees to the orig-
[fols. 17-31] inal defendant.

To which findings of fact and conclusions of law the defendant and the garnishees except.

Dated at Galveston, Texas, July 26, 1927.

C. G. Dibrell, Judge.

[File endorsement omitted.]

Bond on appeal for $1000.00, approved and filed August 11, 1927, omitted in printing.

[fol. 32] In District Court of Galveston County

No. 39645

C. J. Dick

vs.

The Home Insurance Company et al., Garnishees of Compania General Anglo-Mexicana de Seguros, S. A.

Affidavit for Garnishment—Filed Oct. 27, 1923

Now comes C. J. Dick, plaintiff in the above entitled and numbered cause, and makes application for a writ of garnishment against The Home Insurance Company, a corporation duly incorporated, and against the Franklin Fire Insurance Company, a corporation duly incorporated, and being duly sworn says: that plaintiff has instituted a suit for debt against Compania General Anglo-Mexicana de Seguros, S. A. defendant, to recover the sum of $35,000.00 with six per cent interest from August 1, 1921; that said debt is just, due and unpaid, and that the defendant has not, within affiant's knowledge, property in its possession within this State subject to execution sufficient to satisfy such debt; that the garnishment is not sued out to injure either the defendant or the garnishee or either of them; that the said garnishees, The Home Insurance Company, is a corporation as aforesaid, duly incorporated;

doing a general insurance business, and having a permit to do business within the State of Texas, and having a local agent in Galveston County Texas, in the person of Fred M. Burton, upon whom service can be had; pany is corporation as aforesaid, duly incorporated, doing a general insurance business and having a permit to do business within the State of Texas, and having a local agent in Galveston County, Texas, in the person of John Adriance, Jr., upon whom service can be had; that affiant has reason to believe, and does believe, that the said garnishees are indebted to the Compania General Anglo-Mexicana [fol. 33] de Seguros, S. A. defendant, or have in their hands effects belonging to said defendant.

C. J. Dick.

Sworn to and subscribed before me this 27th day of October, A. D. 1923. W. E. Price, Notary Public in and for Galveston County, Tex. (Seal.)

Wherefore plaintiff prays that a writ of garnishment issue against the Home Insurance Company and the Franklin Fire Insurance Company, garnishees.

C. J. Dick, Plaintiff.

[File endorsement omitted.]

In District Court of Galveston County

[Title omitted]

Order Granting Tex. & Gulf SS. Co. & Suderman & Young Leave to Intervene for Their Interest

Leave is granted Texas & Gulf Steamship Company and Suderman & Young to intervene for their interest.

In District Court of Galveston County

[Title omitted]

Intervention of Tex. & Gulf S/S. Co. & Suderman & Young—Filed Nov. 5, 1923

Now comes the Texas & Gulf Steamship Company a corporation doing business under and by virtue of the laws of

the State of Texas, and Suderman & Young, Inc., a corporation doing business under and by virtue of the laws of the State of Texas, and leave of the court first had and obtained, files this their plea of intervention and respectfully represent to the Court:

[fol. 34]

1

That the plaintiff herein is justly and truly indebted to the intervenor the Texas & Gulf Steamship Company in the sum of Fourteen thousand Dollars ($14,000.00) together with interest thereon from the 21st day of December, 1920; that the insurance sued for by the plaintiff here is made payable to this intervenor as its interest might appear;

That the said intervenor sold to the plaintiff herein the vessel called the "R. Waverly" under a written agreement by which title to said vessel should remain in the intervenor herein, the Texas & Gulf Steamship Company, until said purchase price should be fully paid, and that by reason of plaintiff's failure to pay said purchase price, the insurance money herein sued for is payable to said intervenor, the Texas Gulf & Steamship Company, to the extent of its indebtedness hereinbefore more fully set out, as well as for the indebtedness more fully set out in the succeeding paragraph of this plea in intervention.

2

That without the knowledge and consent of this intervenor and in violation of an agreement made and entered into by and between this intervenor and the said Dick, the said plaintiff Dick took said vessel beyond the jurisdiction of the United States and into the jurisdiction of the Republic of Mexico.

That in an endeavor to regain possession of said vessel and at the special instance and request of said Dick, this intervenor expended for counsel fees and other expenses the sum of Three Thousand Dollars ($3,000.00) for which said amount the said plaintiff is liable to this intervenor, and being so liable, promised and agreed to repay the same to this intervenor, whenever the insurance money for which this suit was brought should be collected by him.

[fol. 35] 3

And said intervenor, Suderman & Young, Inc., would show that prior to the time that the said Dick took said vessel beyond the jurisdiction of the United States, as hereinbefore more fully set out, and on or about the — day of ——, ——, as the special instance and request of said plaintiff, it installed a new engine therein of the reasonable worth and value of six thousand dollars ($6,000.00), which amount the said Dick promised and agreed to pay this intervenor therefor, and to secure which amount a lien was retained on said vessel.

4

That by reason of the foregoing, they have a lien on said vessel, subject only to the lien of the Texas & Gulf Steamship Company, on the insurance monies sought to be recovered herein.

Wherefore these intervenors pray that they may have judgment against the said Dick for the amount claimed by them respectively and judgment against the insurance company, the Compania General Anglo-Mexicana De Seguros, S. A. and that they have judgment also against the garnishees herein, in the event it is ascertained that they have any funds belonging to the said Compania General Anglo-Mexicana de Seguros, S. A. in their possession. And these intervenors pray for such other and further relief as they may be entitled to at law or in equity.

John L. Darrouzet, Williams & Neethe, Attorneys for Intervenors.

[File endorsement omitted.]

[fol. 36] In District Court of Galveston County

[Title omitted]

Original Answer of the Home Insurance Co.—Filed Dec. 3, 1923

To said Honorable Court:

Now comes the Home Insurance Company, one of the garnishees in the above numbered and entitled cause, and

answering the writ of garnishment served on it herein, respectfully shows to the court that it is not indebted to the said Compania General Angle-Mexicana de Seguros, S. A. in any sum whatsoever, and was not indebted to the said Compania General Anglo Mexicana de Seguros, S. A. in any sum whatsoever at the time of the service of the writ of garnishment upon it herein, and has not been indebted to the said Compania General Anglo-Mexicana de Seguros, S. A. in any sum whatsoever at any time between the time of the service of the writ or garnishment upon it herein and the time of filing of this answer in garnishment. That it has no effects of the said Compania General Anglo-Mexicana de Seguros, S. A. in its possession and had no effects of said Compania General Anglo-Mexicana de Seguros, S. A. in its possession at the time of the service of the writ of garnishment upon it herein, and has not had any effects of said Compania General Anglo-Mexicana, S. A. in its possession at any time between the time of the service of the writ of garnishment upon it herein and the filing of this answer. That there are no other persons within its knowledge who are indebted to said Compania General Anglo-Mexicana de Seguros, S. A., or who have effects bel-nging to it in their possession.

[fol. 37] This garnishee respectfully alleges that it has been compelled to employ counsel to represent it in this garnishment and to prepare and file this answer for it, and having fully answered herein prays that it may be hence discharged with its costs, and that it recover such reasonable atorneys's fees as the court may see fit to allow it.

Terry, Cavin & Mills, Attorneys for Garnishee, the Home Insurance Company.

Duly sworn to by C. A. Hulme. Jurat omitted in printing.

[fol. 38] [File endorsement omitted.]

IN DISTRICT COURT OF GALVESTON COUNTY

[Title omitted]

ORIGINAL ANSWER OF THE FRANKLIN FIRE INS. CO., GARNISHEE—Filed Dec. 3, 1923

To said Honorable Court:

Now comes the Franklin Fire Insurance Company, one of the garnishees in the above numbered and entitled cause, and answering the writ of garnishment served on it herein, respectfully shows to the court:

That it is not indebted to the said Compania General Anglo-Mexicana de Seguros, S. A. in any sum whatsoever, and was not indebted to the said Compania General Anglo-[fol. 39] Mexicana de Seguros, S. A. in any sum whatsoever at the time of the service of the writ of garnishment upon it herein, and has not been indebted to the said Compania General Anglo-Mexicana de Seguros, S. A. in any sum whatsoever at any time between the time of the service of the writ of garnishment upon it herein and the time of the filing of this answer in garnishment. That it has no effects of the said Compania General Anglo-Mexicana de Seguros, S. A. in its possession, and had no effects of said Compania General Anglo-Mexicana de Seguros, S. A. in its possession at the time of the service of the writ of garnishment upon it herein, and has not had any effects of said Compania General Anglo-Mexicana de Seguros, S. A. in its possession at any time between the time of the service of the writ of garnishment upon it herein and the filing of this answer. That there are no other persons within its knowledge who are indebted to said Compania General Anglo-Mexicana de Seguros, S. A., or who have effects belonging to it in their possession.

This garnishee respectfully alleges that it has been compelled to employ counsel to represent it in this garnishment and to prepare and file this answer for it, and having fully answered herein prays that it may be hence discharged with its costs, and that it recover such reasonable attorney's fees as the Court may see fit to allow it.

Terry Cavin & Mills, Attorneys for Garnishee, Franklin Fire Insurance Co.

Duly sworn to by C. A. Hulme. Jurat omitted in printing.

[fol. 40] [File endorsement omitted.]

[fol. 41] In District Court of Galveston County.....

[Title omitted]

Controverting Affidavit of Plaintiff, C. J. Dick—Filed July 5, 1924

Now comes the plaintiff in the above entitled and numbered cause and files this his controverting affidavit to the answer heretofore filed herein by the Home Insurance Company, on December 3, 1923, and shows to the Court that the said Garnishee, The Home Insurance Company is indebted to the defendant herein, The Compania General Anglo-Mexicana de Seguros, S. A. in the sum of Fifteen Thousand Dollars ($15,000) for the reasons following:

That heretofore on or about March 18, 1921, the defendant herein made, executed and delivered to the plaintiff herein its certain policy of marine insurance, wherein and whereby it insured the Launch "R. Waverly" or "Waverly R." against the perils of the sea, fire and sinking, in the sum of Thirty-five Thousand Dollars; that thereafter, and while said policy of marine insurance remained of full force and effect, the said Launch "R. Waverly" became a total loss within the terms of said marine insurance policy; that though payment of the amount due under said policy was duly demanded by the plaintiff herein from said defendant, the said amount has not been paid, or any part thereof;

And this plaintiff would further show that shortly after the date of said policy issued by the defendant, the Compania General Anglo-Mexicana de Seguros, S. A., to him, and at a date not known to this plaintiff, but known to the garnishee herein, the said defendant reinsured its obligation under the policy issued by it to the plaintiff with the garnishee, The Home Insurance Company, in the sum of [fol. 42] Fifteen Thousand Dollars ($15,000.00).

That upon the loss of said launch "R. Waverly" as herein before more fully shown and by reason of the contract of reinsurance existing between the defendant herein and the garnishee, The Home Insurance Company, there became due and payable from the garnishee herein to the said defendant the sum of Fifteen Thousand Dollars, and that said garnishee has in its possession the sum of Fifteen Thousand Dollars belonging to the said defendant, The Compania General Anglo-Mexicana de Seguros, S. A.

Wherefore plaintiff prays that he may have a judgment against the said garnishee in the sum of Fifteen Thousand Dollars ($15,000.00), together with interest thereon from the date of the loss of said launch "R. Waverly", and for his costs in his behalf expended.

C. J. Dick.

Duly sworn to by C. J. Dick. Jurat omitted in printing.

[File endorsement omitted.]

[fol. 43] In District Court of Galveston County

No. 39645

[Title omitted]

Controverting Affidavit of Plaintiff, C. J. Dick—Filed July 5, 1924

Now comes the plaintiff in the above entitled and numbered cause and files this his controverting affidavit to the answer heretofore filed herein by the Franklin Fire Insurance Company on December 3, 1923, and shows to the court that the said Garnishee, Franklin Fire Insurance Company is indebted to the defendant herein, the Compania General Anglo-Mexicana de Seburos, S. A. in the sum of Fifteen Thousand Dollars ($15,000.00) for the reasons following:

That heretofore on or about March 18, 1921, the defendant herein made, executed and delivered to the plaintiff herein its certain policy of marine insurance, wherein and

whereby it insured the launch "R. Waverly" or "Waverly R." against the perils of the sea, fire and sinking, in the sum of Thirty-five Thousand Dollars; that thereafter, and while said policy of marine insurance remained of full force and effect, the said launch "R. Waverly" became a total loss within the terms of said marine insurance policy; that though payment of the amount due under said policy was duly demanded by the plaintiff herein from said defendant, the said amount has not been paid, or any part thereof;

And this plaintiff would further show that shortly after the date of said policy issued by the defendant, Compania General Anglo-Mexicana de Seguros, S. A., to him, and at a date not known to this plaintiff, but known to the garnishee herein, the said defendant reinsured its obligation under the policy issued by it to the plaintiff with the gar-[fol. 44] nishee, the Franklin Fire Insurance Company in the sum of Fifteen Thousand Dollars ($15,000.00);

That upon the loss of said launch, as hereinbefore more fully shown and by reason of the contract of reinsurance existing between the defendant herein and the garnishee, the Franklin Fire Insurance Company, there became due and payable from the garnishee herein to the said defendant the sum of Fifteen Thousand Dollars, and that said garnishee has in its possession the sum of Fifteen Thousand Dollars belonging to the said defendant, the Compania General Anglo-Mexicana de Seguros, S. A.

Wherefore plaintiff prays that he may have a judgment against the said garnishee for the sum of Fifteen Thousand Dollars ($15,000.00) together with interest thereon from the date of the loss of said launch "R. Waverly" and for his costs in his behalf expended.

C. J. Dick.

Duly sworn to by C. J. Dick. Jurat omitted in printing.

[File endorsement omitted.]

[fol. 45] In District Court of Galveston County

No. 39645

[Title omitted]

Answer of Garnishees to Plaintiff's Controverting Plea—Filed Jan. 14, 1927

Now comes the Garnishees in the above numbered and entitled cause, and answering the controverting affidavits herein filed by plaintiff and by the intervenor, respectfully show to the court:

That it is not true that by reason of the contract of reinsurance existing between these garnishees and the defendant herein, there became due and payable from the garnishees to said defendant the sum of Fifteen Thousand and 00/100 Dollars ($15,000.00) from each of these garnishees; but that to the contrary, the liability of these garnishees to said defendant is solely to indemnify it against any loss or judgment that it might have to pay upon said policy of insurance; that it is not true that these garnishees each have in their possession the sum of Fifteen Thousand and 00/100 Dollars, ($15,000.00) belonging to the defendant, Compania General Anglo-Mexicana de Seguros, S. A.

These garnishees further respectfully show to the court that the only manner in which it is claimed that this court has jurisdiction over the defendant is by these garnishees, and the filing of a certain suit in this court numbered 39643, and entitled "C. J. Dick versus Compania General Anglo-Mexicana de Seguros, S. A.," in which suit there has been no actual service upon said defendant, but only constructive service by publication, and these garnishees are entitled to urge this proceeding any defenses that the said defendant might urge in said suit numbered 39643, and for such defenses these garnishees allege:

[fol. 46] That plaintiff and intervenor ought not to have or maintain said suit numbered 39643 against said defendant, or have or maintain this garnishment against these garnishees or either of them, because:

1. The policy of insurance mentioned in and declared upon by plaintiff's petition herein, and by the intervenor, contained a stipulation and provision reading as follows:

"It is understood and agreed that no judicial suit or demand shall be entered before any tribunal for the collection of any claim under this policy, unless such suits or demands are filed within one year counted as from the date on which such damage occurs."

That said policy was issued in the Republic of Mexico, and that the above quoted provision thereof was and is valid and enforceable under the laws of the Republic of Mexico, and that said contract was performable and intended to be performed in Mexico, and the clause above quoted is and was valid as a defense to any suit brought to recover on said policy after the expiration of one year from the date of the accrual of the cause of action or damage to the vessel mentioned in plaintiff's petition; that this suit was not filed within one year, from and after the accrual of said cause of action, and these garnishees here now specially plead said facts and the said provision and stipulation of said policy in bar of plaintiff's cause of action herein asserted against them and in bar of the plaintiff's cause of action asserted in said suit numbered 39643.

2. The contract sued on by plaintiff in said suit numbered 39643 was made in the Republic of Mexico, and intended to be performed in the Republic of Mexico, and was subject to the laws of the said Republic of Mexico, which contain certain provisions in Article- 1038, 1039 and 1043, [fol. 47] of the Commercial Code of the Republic of Mexico, and which was in force at the time of the issuance of said policy, and at the time of the accrual of plaintiff's cause of action herein, and which read as follows:

Article 1038. "The rights of action derived from commercial acts shall be subject to prescription in accordance with the provisions of this Code."

Article 1039. "The periods fixed for the enforcement of rights of action arising out of commercial acts shall be fatal except restitution against same is given."

Article 1043. "One year shall prescribe actions derived from contracts of life insurance, sea and land."

That under and by virtue of the above quoted provisions of the Mexican laws, any cause of action such as that as-

serted by plaintiff herein is and was barred if no suit was instituted thereon within one year from the date of the accrual thereof, and these garnishees here now specially plead that no suit was instituted on said policy against the said defendant within such one-year period, and plead such fact and the fact that said suit numbered 36943 was not instituted within said one-year period, nor were the garnishments in this proceeding sued out within one year from the accrual of the cause of action, and plead the provisions of said commercial code of the Republic of Mexico in bar of these garnishments, and of said suit numbered 39643, and pray that they may be hence dismissed.

3. These garnishees further specially plead that the policy declared on by plaintiff in said cause numbered 39643 was void from its inception because it was then represented to the defendant that the value of the vessel alleged to have been insured thereby was in excess of the amount of such policy and these garnishees allege that in fact said representations of plaintiff were not true, and the value of said vessel was not as much as the amount of said policy.

[fol. 48] 4. These garnishees allege that said vessel was not a total loss, and that notwithstanding such fact, the said vessel was abandoned by plaintiff without notice to the defendant in violation of the terms of the policy, and that it was the duty of plaintiff, under the terms of said policy to repair said vessel at the cost and expense of defendant, and defendant is liable, if at all, only for the cost of such repairs, and not for the face of such policy.

Terry, Cavin & Mills, Attorneys for Garnishees.

[File endorsement omitted.]

In District Court of Galveston County

[Titles omitted]

Plaintiff's General Demurrer—Filed Jan. 14, 1927

Now comes the plaintiff C. J. Dick, in the above entitled and numbered causes and demurs generally to the

answer of the defendant and the garnishees herein and says that said answers show no defense to his cause of action and prays judgment of the Court.

Further and specially demurring herein, plaintiff says that that part of the answer of the defendant and the garnishees which undertakes to set up a contractual limitation and which undertakes to set up the limitation of the Republic of Mexico fail to show any defense to the cause of [fol. 49] action herein and should be stricken out:

(a) Because the portions alleged in said answer as being contained in said policy do not form a portion of the cause of action.

(b) Because the statute of the State of Texas prohibits a contractual limitation of less than two years.

(c) Because said matters are in violation of the public policy of the State of Texas and void in this Court.

Wherefore plaintiff prays that said parts of the answer be stricken out and held for naught.

Not waiving the foregoing demurrers, but relying thereon, this plaintiff denies all and singular the allegations in the answer of the above named defendant and garnishees contained.

H. C. Hughes, Williams, Neethe & Williams, Attys.
for Plaintiff & Intervenor.

[File endorsement omitted.]

In District Court of Galveston County

No. 39645

C. J. Dick

vs.

The Home Insurance Co. & The Franklin Fire Insurance Co., Garnishees of Compania General Anglo-Mexicana de Seguros, S. A.

Judgment, Notice of Appeal, etc.—July 26, 1927

On this the 26th day of July, 1927, came on to be heard the above entitled and numbered cause and there appeared

the plaintiff herein C. J. Dick in person and by his attorneys and the intervenors Texas & Gulf Steamship Company, a corporation, and Suderman & Young, Inc., both by their attorneys, and there also appeared The Home Insurance Company and the Franklin Fire Insurance Com-[fol. 50] pany, garnishees, by their attorneys, and all the parties hereto having agreed to submit the matters in controversy between them, both of law and of fact, to the Court for determination, and the Court having heard the pleadings including the answers of the said garnishees and the controverting affidavits filed to said answers and all of the testimony herein; and it appearing to the Court that writs of garnishment were heretofore duly issued herein as an ancillary remedy in connection with cause No. 39,643, entitled C. J. Dick vs. Compania General Anglo-Mexicana de Seguros, S. A. and that in said cause the plaintiff herein is allowed to recover the sum of Seventeen Thousand Five Hundred and Eighty-seven and 50/100 Dollars ($17,587.50) and the intervenors are allowed to recover the sum of Nineteen Thousand and Eigthy-seven Dollars and 50/100 Dollars ($19,087.50) and it appearing to the Court that the said garnishee, The Home Insurance Company is indebted to the Compania General Anglo-Mexicana de Seguros, S. A. in the sum of Eighteen Thousand Three Hundred and Thirty-seven and 50/100 Dollars ($18,337.50); and it further appearing to the Court that the garnishee the Franklin Fire Insurance Company is indebted to Compania General Anglo-Mexicana de Seguros, S. A. in the sum of Eighteen Thousand Three Hundred and Thirty-seven and 50/100 Dollars; it is therefore ordered, adjudged and decreed that the plaintiff and the intervenors herein recover from said garnishee The Home Insurance Company, a corporation, the said amount of $18,337.50, and that the plaintiff and the intervenors recover from said garnishee Franklin Fire Insurance Company, a corporation, the said amount of $18,337.50, together with interest on said sums from this date at the rate of six per cent (6%) per annum and all costs in this behalf incurred, said amounts so recovered against the said garnishees to be apportioned and prorated between the plaintiff and intervenors herein on the basis of the recoveries had by them against the said Compania [fol. 51] General Anglo-Mexicana de Seguros, S. A. in cause No. 39,643, and which amounts so recovered when

paid by said garnishees shall be in full satisfaction of the judgments rendered herein against the said garnishees. To which judgment, order and decree the garnishees, The Home Insurance Company and the Franklin Fire Insurance Company, duly excepted and in open court gave notice of appeal to the Court of Civil Appeals for the First Supreme Judicial District of Texas, at Galveston, and ninety (90) days from and after the adjournment of this Court are allowed said garnishes for the filing of statement of facts and bills of exception herein.

IN DISTRICT COURT OF GALVESTON COUNTY

[Titles omitted]

FINDINGS OF FACT & CONCLUSIONS OF LAW—Filed July 26, 1927

Findings of Fact

I

I find that on the 18th day of March, 1921, the defendant, the Compania General Anglo-Mexicana de Seguros, S. A., issued its policy No. 18098 to Charles B. Bonner of Tampico, Mexico, wherein said company insured the tug R. Waverly also known as Waverly R, for a period of one year from the last named date, for the sum of Thirty-five Thousand ($35,000.00) Dollars, the loss or damage under said policy being payable to the Texas & Gulf Steamship Company and C. J. Dick, as their respective interests might [fol. 52] appear; and that the defendant received from the parties interested the full amount of premium demanded for the issuance of said policy.

II

I find that on May 24, 1921, all the right of Charles B. Bonner, in said policy was transferred to A. W. Turner, and that on July 18, 1921, all the rights of A. W. Turner in said policy were transferred to and solely vested in the plaintiff, C. J. Dick.

III

I find that the plaintiff, C. J. Dick, had a beneficial and insurable interest in said vessel, and that said policy hereinabove described, as originally issued was for the benefit of the plaintiff, C. J. Dick, and the Texas & Gulf Steamship Company, according to the respective interests of said parties in said vessel. That thereafter Suderman & Young duly acquired an interest in said policy or the proceeds thereof.

IV

I find that while said policy was in full force and effect, and on the 27th day of July, 1921, the vessel insured under the policy hereinabove described, took fire and was burned and sunk in the harbor of Tampico, Mexico, and thereby became and was a total loss, said facts being made known to the insurance company by the proof of total loss required by the policy.

V

I find that on the 29th day of March, 1921, the duly authorized agents of the Home Insurance Company and the Franklin Fire Insurance Company in Mexico City issued notices to said companies that each of them was bound for re-insurance in the sum of Fifteen Thousand ($15,000.00) Dollars under the policy No. 189098, and that said notices of re-insurance and the premiums for same were accepted and acted upon by The Home Insurance Company and the Franklin Fire Insurance Company.

[fol. 53] VI

I also find that the plaintiff and intervenors have demanded payment of the defendant, and that no payment has ever been made.

VII

I find that C. J. Dick, the plaintiff, left Mexico where he was temporarily sojourning, within about ten days after the total loss of the R. Waverly, and that he has never at any time been a permanent resident of the Republic of Mexico,

but that he has at all times been a resident citizen of the State of Texas.

VIII

I find that garnishments were issued in cause No. 39645 and that there is now in the hands of each of the garnishees The Home Insurance Company and the Franklin Fire Insurance Company Fifteen Thousand ($15,000.00) Dollars, making a total sum of Thirty Thousand ($30,000.00) Dollars belonging and due to the original defendant, Compania General Anglo-Mexicana de Seguros, S. A. in the hands of said garnishees, together with interest on said sum from December 3, 1923, on which date the garnishees filed their answers in garnishment wherein they denied that they were indebted to the original defendant, Compania General Anglo-Mexicana de Seguros, S. A.

Conclusions of Law

I

I conclude as a matter of law that by reason of the policy and the total loss of said vessel, and the proof of same, the plaintiff and those entitled thereto in connection with the plaintiff should have judgment for the amount of money brought within the jurisdiction of this Court by garnishments issued in cause No. 39,645.

[fols. 54-60]

II

I further conclude that the plaintiff and the intervenors, they having agreed among themselves as to the amounts due between them, should have judgment against the garnishees for the sum sequestered by garnishment, and which said sum is found to be due from the garnishees to the original defendant.

To which findings of fact and conclusions of law the defendant and garnishees except.

Dated at Galveston, Texas, July 26th, 1927.

C. G. Dibrell, Judge.

[File endorsement omitted.]

Home Insurance Co. bond on appeal for $40,000, approved and filed August 11, 1927, omitted in printing.

[fols. 61-68] Franklin Fire Ins. Co. bond on appeal for $40,000, approved and filed August 11, 1927, omitted in printing.

[fol. 69] In District Court of Galveston County

No. 39645

[Title omitted]

Garnishees' Assignments of Error—Filed Nov. 7, 1927

Now come garnishees in the above numbered and entitled cause and file the following as their assignments of error, and respectfully show to the Court that the trial Court committed error in the following particulars:

1

The Court erred in sustaining the demurrer and exception of the plaintiff to so much of the answer of garnishees to plaintiff's controverting plea as pleaded the provision of the policy issued by Compania General Anglo-Mexicana de Seguros, S. A. reading as follows:

"It is understood and agreed that no judicial suit or demand shall be entered before any tribunal for the collection of any claim under the policy, unless such suits or demands are filed within one year counted as from the date on which such damage occurs."

2

The Court erred in sustaining the demurrer of the plaintiff to so much of these garnishees' answer to plaintiff's controverting plea as pleaded the provisions of Articles 1038, 1039 and 1043 of the Commercial Code of the Republic of Mexico.

3

The Court erred in its fourth findings of fact reading as follows:

"I find that while said policy was in full force and effect on the 27th day of March, 1921, the vessel insured under the policy hereinabove described took fire and was burned and sunk in the harbor of Tampico, Mexico, and thereby became and was a total loss, said facts being made known to [fol. 70] the Insurance Company by the proof of total loss required by the policy,"

because the undisputed evidence shows that the said vessel was not a total loss within the meaning of the policy.

4

The Court erred in its eighth finding of fact, reading as follows:

"I find that garnishments were issued in cause No. 39645 and that there is now in the hands of each of the garnishees, the Home Insurance Company and the Franklin Fire Insurance Company, $15,000.00, making a total sum of $30,000.00 belonging and due to the original defendant, Compania General Anglo-Mexicana de Seguros, S. A. in the hands of said garnishees, together with interest on said sum from December 3, 1923, on which date the garnishees filed their answers in garnishment, wherein they denied that they were indebted to the original defendant, Compania General Anglo-Mexicana de Seguros, S. A.,"

because under the terms of the agreements between the Home Insurance Company and the Franklin Fire Insurance Company and the Compania General Anglo-Mexicana de Seguros, S. A., the said Home Insurance Company and Franklin Fire Insurance Company were merely indemnitors of said Compania General Anglo-Mexicana de Seguros, S. A. and no sum was due from them to said Compania General Anglo-Mexicana de Seguros, S. A., or did they have any sum in their hands belonging to it at the time of the filing of their answers in garnishment herein.

5

The Court erred in its first conclusion of law, which is as follows:

"I conclude as a matter of law that by reason of the policy and the total loss of said vessel and the proof of same, the plaintiff and those entitled thereto in connection with [fol. 71] the plaintiff should have judgment for the amount of money brought within the jurisdiction of this Court by garnishments issued in cause No. 39645,"

because the undisputed evidence shows that the vessel was not a total loss and that plaintiff is not entitled to recover under the terms of the policy.

6

The Court erred in its second conclusion of law, reading as follows:

"I further conclude that the plaintiff and the intervenors, they having agreed among themselves as to the amounts due between them, should have judgment against the garnishees for the sum sequestered by garnishment and which said *said* sum is found to be due from the garnishees to the original defendant,"

because the undisputed facts show that plaintiff is not entitled to judgment in this cause against either the original defendant or the garnishees.

7

The Court erred in rendering judgment in favor of plaintiff against these garnishees, because the Court had no jurisdiction to render such judgment, in that the only jurisdiction obtained by the Court over the original defendant, Compania General Anglo-Mexicana de Seguros, S. A. was by citation by publication and by garnishment sued out against these garnishees under alleged reinsurance agreements and said reinsurance agreements and the facts show that these garnishees were merely indemnitors of the original defendant, and that there is no liability on the part of these garnishees to the original defendant until and unless

a valid judgment should be rendered against said original defendant, and, therefore, these garnishees were not subject to garnishment and the original defendant was not subject to the jurisdiction of the Court.

[fols. 72-90] 8

The Court erred in rendering judgment in favor of plaintiff against these garnishees, because any cause of action which plaintiff had against the original defendant, Compania General Anglo-Mexicana de Seguros, S. A. was barred by the provisions of the Mexican Commercial Code applicable to the suit of the plaintiff against said original defendant.

9

The Court erred in rendering judgment against these garnishees, because the cause of action asserted by plaintiff against the original defendant, Compania General Anglo-Mexicana de Seguros, S. A. could not be maintained because of the provisions of the policy issued by the said original defendant, Compania General Anglo-Mexicana de Seguros, S. A. sued on by plaintiff, no suit having been instituted thereon within one year from the date of the loss of the vessel.

10

The Court erred in rendering judgment in favor of plaintiff against these garnishees, because no liability on the part of the original defendant, Compania General Anglo-Mexicana de Seguros, S. A. to plaintiff on the policy sued on by plaintiff against said original defendant was shown to exist under the evidence, in that the vessel was not shown to have been a total loss.

Wherefore these defendants pray that the judgment may be reversed.

Terry, Cavin & Mills, Attorneys for Defendant.

[File endorsement omitted.]

[fols. 91-93] IN DISTRICT COURT OF GALVESTON COUNTY

Statement of Facts

EXHIBIT 1

Compania General Anglo-Mexicana De Seguros, S. A., Mexico. Agentes Generales: Wm. B. Woodrow Co., S. A. la. Bolivar 18. Apartado 506, Mexico, D. F. Seguro Sobre Embaracaciones. Poliza No. 18098 Nombre Chas. B. Bonner, Tampico, Tamps. Desde 18 de Marzo, de 1921 Hasta 18 de Marzo de 1922. Premio y gastos $3,248.50. Moneda Americana. Sirvase Vd. tener la bonded de examinar esta Poliza y sus condiciones, porque si no se da cumplimeiento a las mismas, la Compania no sera responsable.

* * * * * * *

[fol. 94] EXHIBIT TO STIPULATION

(The original policy, being in Spanish, is hereinafter attached, marked "Exhibit No. —.")

(Policy)

Translation

From March 18th, 1921, to March 18th, 1922

Premium & Expenses: Premium, $3,150.00; Policy, .50; Tax, 94.50; Stamps, 3.30—Total, $3,248.50, U. S. Currency, —.

Compania General Anglo-Mexicana De Seguros, S. A.

Capital & Reserve Over $500,000

Policy Number: 18098

[fol. 95] This Company operates in combination with Powerful Foreign Insurance Societies.

General Offices: First Bolivar Street, No. 18, Mexico City.

General Agents: Wm. B. Woodrow Co., S. A., Mexico City.

* * * * * * *

La Compania General Anglo-Mexicana de Seguros, S. A., Mexico D. F. (The General Anglo-Mexican Insurance Company, Ltd., of Mexico), for account of Mr. Chas. B. Bonner of Tampico, Tamps.—Losses, in case there be any, shall be payable in the City of Mexico in current funds of the United States of Mexico, or their equivalent elsewhere, to himself or to his order—

Do assure, and he is hereby assured, losses or no losses, up to an amount of thirty-five thousand dollars, American money, from the eighteenth day of March, 1921, until the eighteenth day of March, 1922, said assurance commencing and terminating at twelve, noon, Tampico time.

This agreement subject to the following conditions: This Assurance is limited, for its effects, to the Panuco and Tuxpam rivers, and to such interior waters as may communicate therewith, commonly used for the transportation of cargo and/or passengers, to and from the rivers, camps and places within the districts known as the Petroliferous (or oil) Regions of "Panuco" or "La Huasteca," Notwithstanding, permission is granted to tugs (tow-boats), and only such, to make coasting voyages or trips within the limits of Tampico, State of Tamulipas, and Tuxpam, State of Veracruz, with the option of touching at Port Lobos and its environs, but never to go outside a limit of five nautical miles from the co-st, in consideration of the payment of an additional premium of — for each round trip, [fol. 96] the Assured obligating himself, on his part, to give written advice to the Assuring Company, of each intended voyage, in advance of, or simultaneously with, the departure of the vessel.

It is understood and agreed that the Assuring Company shall be considered free of all responsibility for any loss that may be occasioned by possession, despoiling, expropriation or secuestration ordered or imposed by Constistuted Authorities, Federal or Local, on the hull, rigging, equipment, provisions, artillerty, ammunition, boats, and

other accessories and machinery of the tug "Waverly R.," detailed description of which is in the possession of this Company, or whatever be the name or names under which this vessel be known, now or in future, the Company's responsibility commencing, as stated, and continuing without interruption during the stated period of time, according to the exigencies of its service, in port or at sea, in docks, or dockyards, under way, dykes, or bridges, at all times, places or occasions, whatever, or whatever the service or traffic, permitting navigation by steam or by sail, with or without pilots, towing or being towed, lending assistance to ships and/or vessels in all situations and in any condition, and trial trips, with liberty to discharge, interchange or to take on board merchandise, money, passengers or provisions wherever the vessel may touch, and to conduct merchandise, cattle on foot, etc., above or below board, including the risks of entry and leaving docks, turning-basins and port movements, and entrance to or leaving [fol. 97] careenages, in as many times as may be necessary, during the term of this Policy.

Said vessel, etcetera, inasfar as the Assured is concerned, and by agreement entered into between the Assured and the Assuring Company, is valued and shall be valued, for the effects of this assurance, as follows:

Hull, rigging, equipment, accessories, etc	$15,000.00
Machinery, etc., and all pertaining thereto	15,000.00
	$30,000.00, U.S. Cy.

The winch-boilers, winches, capstans, steering-gear, etc., and apparatus of electric lighting shall be considered as forming part of the hull, and not of the machinery.

There shall be excluded from the assurance the refrigerating machinery and the insulating system of same, unless expressly included in this policy, or unless they shall likewise belong to the owners of the vessel.

The assuring company shall receive, as premium on this policy, the sum of three thousand one hundred and fifty dollars, U. S. Cy., calculated at the rate of nine per cent.

The risks and dangers for which we, the said Assurors, are willing to hold ourselves responsible, and which responsibility we assure, are those of sea, waters, fire, robbery

of the captian, mate or crew, explosions which may cause loss or damage to the property herein assured, and other risks, dangers or disasters arising from sea or earth which may result or cause deterioration, detriment or damage to said vessel, etc., or any of its parts. And in the event of any loss, or damage, it shall be legal and obligatory on [fol. 98] the part of the Assured or his assigns, to appear, either personally or by means of his representatives or employees, before the competent authorities or tribunals, or to take such extrajudicial action, make voyages or trips or in the defence, safeguarding or recuperation of said vessel or any of its parts without prejudice to this Assurance, the assurors contributing to the expenses thereby incurred, in proportion to the sum herein assured, and it is expressly declared and agreed that no act on the part of either the Assured or the Assurors, undertaken for the recuperation, salvaging or conservation of the property assured, shall be considered as a renouncement of rights or acceptance of abandon.

This Assurance shall be free from grounding on bars or mud banks, any such grounding shall not be considered as going ashore within the terms and conditions of this Policy.

This Assurance being for specific loss and/or damage to the assured vessel, or any of its parts, it shall not be considered as a guarantee of the responsibility of a third party of any character whatsoever.

It is further understood and agreed that, in the event of salvage, towage or other help given to the vessel assured under this policy, by any other vessel, whether it belong to the same owners in whole or in part, the value of such services (without taking into consideration the common ownership of the vessels, if such there be) shall be determined by arbitration, and the amount specified in such decision insofar as the interests herein assured are concerned, shall constitute a charge on this policy.

In the event of claim for loss or damage on vessels constructed of wood, there shall be deducted from the cost of the metal, or caulking under the metal and of putting into dock, first the value of the old metal and of its nail- [fol. 99] ing, and then, of the rest, two and one-half per cent (2½%) for each month that the metal may have

been on the vessel at the time of removing it, and if said metal has been on three years, then the total value of same shall be for account of the Assured. On vessels which are not metal bottomed, there shall be deducted from the cost of caulking the bottom as far up as the minimum floating line, and the docking charge for that purpose, two per cent (2%) for each and every month since the vessel's last caulking date, and there shall be deducted from the cost of cleaning and painting the bottom, and of dry-docking for that purpose, one-twelfth (1/12th) for each and every month since the vessel was last cleaned, and from the cost of any cleaning or caulking there shall be deducted twenty-five per cent (25%) for each complete year of use, and from all other repairs, excepting those made to the anchors, there shall be deducted one-third (⅓) on vessels older than two months, counted as from their date of registry. Notwithstanding, on vessels constructed of steel, the deduction of one-third shall not be made on the iron or steel work of the hull, masts or rigging, but the foregoing deductions will be made in the painting and other charges.

Notwithstanding any stipulation to the contrary which may appear in this policy, this Assurance is guaranteed to be free from Particular Average, unless caused by grounding (going ashore), sinking, fire or collision; and on all claims on internal combustion engines or machinery, there shall be deducted ten per cent (10%) of the amount herein fixed as the value of the machinery.

Free of Gross Average and any other claim or expense, excepting salvage, which may arise from interruption, discomposition, or disarrangement of the machinery.

[fol. 100] Losses and expenses of salvage shall be paid in accordance with the York-Antwerp rules, and these shall be assessed by the Assurors. Nothing, however, in this paragraph shall annul or modify in any manner, the preceding paragraph.

Subject moreover, in any event, to the following contributing value clause:

In cases where the Assured is responsible for, or has paid any contribution to the Gross Average, and the contributing value be greater than the assured value, the amount collectible by reason of indemnity under this policy, shall only be in proportion to the contributing value over the assured

value, and when the contributing value has been reduced by Particular Average, for which the Assurors may be liable, the sum which corresponds to this Policy by way of indemnification of Particular Average shall be deducted from the assured sum, so that in this manner may be fixed the proportional part of contribution for which the assurers are liable. The amount of the liability of the Assurors, thru salvage, shall be computed in the same manner. The maximum of the Assurors liability shall, in no case, exceed the amount of this policy, during the term of same.

In no case shall the Assurors be liable for unrepaired damages in addition to subsequent total loss suffered during the term of this policy.

There shall be no claim, under this policy, for estimated total loss, unless the cost of salvage and repair exceed the amount assured.

In order to determine whether the vessel is an estimated total loss, the assured value shall be considered the repaired value and there shall not be taken into account the amount of the damages or the value that the vessel or its carts may have as junk or used material.

[fol. 101] In the event of total loss or estimated total loss, no claim shall be made by the Assurors for freights or towage, whether or no formal advice is given of abandonment.

On the expiration of this policy, if the vessel be at sea, or in distress, or in port, either thru distress or in port of call, it shall remain covered on condition that previous and written advice is given to the assurors, and by payment of the first month's premium calculated pro-rata, until its arrival at its destination.

If, by mutual agreement, this policy is cancelled, there shall be returned — per cent (—%) for each thirty days of the unexpired term.

The Assured agrees that, should he fail to pay the premium within thirty days of the commencement of this policy, same shall be cancelled, and without any advice.

In the event of accident, which may cause claim for loss or damage under this present policy, written advice must be given the Assurors, before any expert examination is undertaken, so that they, the Assurors, may nominate their own Surveyor, should they so desire, and so that the amount of the damage may be determined, the Assurors may so-

licit, or require that the assured solicits, bids on the repair of said damage.

It is understood and agreed that no judicial suit or demand shall be entered before any tribunal for the collection of any claim under this policy, unless such suits or demands are filed within one year, counted as from the date on which such damage occurs.

This assurance is held free of all claim for capture, imprisonment, arrest, restriction or detention of the vessel assured and the consequences of such acts and the results of same (except piratry), as also on account of all consequence of hostilities or warlike operations, carried out either before or after declaration of war.

[fol. 102] A strict condition of the present contract is that the Assuring Company is considered exempt from all responsibility for l-ss occasioned thru strike, general stoppages, or other workman's disorders mutiny or civil strife.

It is further understood and agreed that if the interests of the assured and herein assured are sold or transferred, then, and except the assuring company gives its written consent to such sale or transfer, this Policy shall by that act become cancelled as from the date of such sale or transfer, unless the vessel has cargo on board or has already left the loading port, or is at sea, in ballast; in any of such cases the cancellation shall be suspended until the arrival of the vessel in port of final discharge, if she be loaded, or to the port of destination, if she be in ballast.

It is understood and agreed that there shall be no cause for claim, neither shall claim be made, based on the loss or frustration of voyages or trips in project, on account of detainment, imprisonment, restriction or arrest of the vessel, ordered or imposed by the Constituted Authorities, Federal or local, or by reason of popular insurrection or revolution, or ordered or imposed by foreign governments or their agents, outside the jurisdictional waters of the Republic.

The present policy is subjected to the dispositions of the Commercial Code, in that it does not alter or modify the stipulations which that same contains.

It is agreed that any loss or damage ascertained and proven to be due to the Assured under this Policy shall be held payable to the Texas Gulf Steamship Co. of Galveston,

Texas, and C. J. Dick, as their respective interests may appear.

[fol. 103] In witness whereof the Company has issued the present policy duly signed by its Directors.

Mexico, on the 30th day of March, 1921.

Translator's Note

I hereby certify that the foregoing is a true and faithful translation of the original, written in the Spanish Language, executed to the best of my skill and ability, this twenty-ninth day of June, 1926.

Galveston, Texas, U. S. A.

(Signed) A. Mostyn Lloyd, Public Translator.

Endorsement No. 190 to attach to and form part of Policy No. 18098, issued by the Compania General Anglo-Mexicana de Seguros, S. A., in favor of Mr. Chas. B. Bonner of Tampico, Tampa.

It is hereby declared and agreed that as from May 14th, 1921, all the interests, rights and obligations of the above mentioned policy, are transferred to and solely vested in Mr. A. W. Turner as Lessee of the Insured Craft.

The Loss Payable Clause as mentioned on text of Policy remains unchanged.

Noted in this Company's Registers.

Mexico, D. F., May 24th, 1921.

Consejero.

Endorsement No. 205 to attach to and form part of Policy No. 18098, issued by the Compania General Anglo-Mexicana De Seguros, S. A., in favour of Mr. A. W. Turner, of Tampico, Tamps.

[fol. 104] It is hereby declared and agreed that that as from July 12th, 1921, all the interests, rights and obligations of the above mentioned Policy, are transferred to and solely vested in Mr. C. J. Dick as Lessee of the Insured Craft.

The Loss Payable Clause as mentioned on text of Policy remains unchanged.

Noted in this Company's Registers.

Mexico, D. F., July 18th, 1921.

Consejero.

Wm. B. Woodrow Co., S. A., Underwriters and Adjusters, Mexico, D. F.

La. Bolivar 18, Apartado 506

Inland Water Craft-Hulls

Declaration No. 6

Mexico, 29th March, 1921.

The Home Insurance Company, N. Y.:

Please be advised that we have bound reinsurance as follows:

$15,000., U. S. Cy. (part of $35,000, U. S. Cy.), on "Waverly R.," Tug Boat, in favor of Chas. B. Bonner, Tampico.

Term: One year from 18th March, 1921, to 18th March, 1922.

Anglo-Mexicana Policy No. 18098. Item No. —. Rate, 9%. Premium, $1,350.00, U. S. Cy.

Closed Bord. 2.

(Exhibit # 3.)

[fols. 105-175] Wm. B. Woodrow Co., S. A., Underwriters and Adjusters, Mexico, D. F.

La. Bolivar 18, Apartado 506

Inland Water Craft—Hulls

Declaration No. 180

Mexico, 29th March, 1921.

Franklin Fire Insurance Company, New York:

Please be advised that we have bound reinsurance as follows:

$15,000, U. S. Cy. (part of $35,000, U. S. Cy.), on "Waverly R," Tug Boat, in favour of Chas. B. Bonner, Tampico.

Term: One year from 18th March, 1921, to 18th March, 1922.

Anglo-Mexicana Policy No. 18098. Item No. —. Rate, 9%. Premium, $1,350.00, U. S. Cy.

Closed Bord. 5.

(Exhibit #4.)

Home Insurance

Bordereau No. 2

Inland Water Craft (Hulls)

From Wm. B. Woodrow Co., S. A., Mexico

Consec. No.	Policy No.	Item No.	Name of insured	Description of craft	Sum insured	Sum reinsured	Term of reinsurance From	Term of reinsurance To	Rate %	Reinsurance premium
					U.S.Cy.	U.S.Cy.				U.S.Cy.
2	C/N 3035	..	Marimon Mexican Oil Cpn.	"Fallie," Stern Wheeler.....	$35,000	$15,000	4 3 1921	15 3 1921	9pa	$40.68
3	18085	..	do.	"J. Marimon," Stern Wheeler.	35,000	15,000	4 3 1921	4 3 1922	9	1,350.00
4	18089	1	New England Fuel Oil Co.	"No. 12," Deck Barge.....	14,000	.....	16 3 1921	16 3 1922	3½	490.00
5	18089	2	do.	& by another Policy.....	21,000	14,000	16 3 1921	16 3 1922	3½	490.00
6	18098	..	Chas. B. Bonner.	"No. 13," Deck Barge.....	14,000	.....				
7	18099	1	Marimon Mexican Oil Cpn.	& by another Policy.....	21,000	14,000				
8	18099	2	do.	"Waverly R," Tug.....	35,000	15,000	18 3 1921	18 3 1922	9	1,350.00
				"M M O. C ⁄ 10," Deck Barge.	35,000	15,000	23 3 1921	23 3 1922	3½	525.00
9	18102	..	Cfa. Transporte de Chapopote, S. A.	"M M O. C ⁄ 20," Deck Barge.	35,000	15,000	23 3 1921	23 3 1922	3½	525.00
				"Major Slack," Stern Wheeler.	35,000	15,000	30 3 1921	30 3 1922	9	1,350.00
				Totals	$238,000	$118,000				$6,120.68 U. S. Cy.

Remraks: ——.

Date: 31st March, 1921.

J. L.

[fol. 176] In Court of Civil Appeals of Texas

No. 9157

The Home Insurance Co. et al., Appellant,

vs.

C. J. Dick et al., Appellee-

From Galveston County

Judgment—April 19, 1928

"This cause came on to be heard on the transcript of the record and the same being inspected, because it is the opinion of this Court that there was no error in the judgment, it is therefore considered, adjudged and ordered that the judgment of the Court below be in all things affirmed; that the appellees, C. J. Dick, Texas & Gulf Steamship Company and Suderman & Young, Inc., recover of the appellant, The Home Insurance Company, and its surety, Globe Indemnity Company, and the appellant, The Franklin Fire Insurance Company, and its surety, Globe Indemnity Company, the sum or sums adjudged to them or each of them by the judgment of the Court below and all costs in this cause incurred, and this decision be certified below for observance."

[fol. 177] In Court of Civil Appeals of Texas

No. 9156

Compania General Anglo-Mexicana de Seguros, S. A., Appellant,

vs.

C. J. Dick et al., Appellee-

From Galveston County

Judgment—April 19, 1928

"This cause came on to heard on the transcript of the record and the same being inspected, because it is the opin-

ion of this Court that there was no error in the judgment, it is therefore considered, adjudged and ordered that the judgment of the Court below be in all things affirmed; that the appellant Compania General Anglo Mexicana de Seguros S. A., and its surety, Globe Indemnity Company, pay all costs incurred by reason of this appeal and all such costs as were adjudged against the said appellant in said cause by the trial court. It is further ordered that this decision be certified below for observance."

[fol. 178] IN COURT OF CIVIL APPEALS OF TEXAS

No. 9157

THE HOME INSURANCE COMPANY ET AL., Garnishees, Appellants,

vs.

C. J. DICK, Appellee

No. 9156

COMPANIA GENERAL ANGLO-MEXICANA DE SEGUROS, S. A., Appellants,

vs.

C. J. DICK, Appellee

Appeal from the District Court of Galveston County

OPINION—Filed May 3, 1928; in Supreme Court June 29, 1928

A statement in these causes, which have been submitted and considered as one, acquiesced in by the appellees as being correct, is thus taken in full from the brief for appellants:

"C. J. Dick filed suit in the district court of Galveston County against Compania General Anglo-Mexicana De Seguros, S. A. (which will hereafter be called for brevity sake, 'the Mexican Insurance Company'), to recover $35,000 on a policy of insurance issued by the Mexican Insur-

ance Company on the tug 'R. Waverly', alleging that the vessel had caught on fire in Tampico, Mexico, and became a total loss, and that thereby the policy matured for the face thereof. The Mexican Insurance Company was a corporation incorporated under the laws of Mexico and had no agent in this State. Appellee, Dick, sued out ancillary writs of garnishment against the Home Insurance Company and The Franklin Fire Insurance Company, as Garnishees of the Mexican Insurance Company. The Home Insurance Company and The Franklin Fire Insurance Company will hereafter be designated 'The American Insurance Companies.' The affidavit for garnishment was in statutory form.

[fol. 179] In as much as many of the questions presented in these appeals are common to both the Mexican Insurance Company and the American Insurance Companies, this brief will be presented for all of them, with such additional portions as may be applicable to the Garnishees alone.

The Texas & Gulf Steamship Company and Suderman & Young were allowed to intervene in the suits. The American Insurance Companies, as Garnishees, answered, denying any indebtedness to the Mexican Insurance Company. The plaintiff filed a controverting affidavit alleging that each of the American Insurance Companies was indebted to the Mexican Insurance Company in the sum of $15,000.00, on the ground that shortly after the issuance of the policy by the Mexican Company it had reinsured its obligation assumed thereby with each of the American Companies to the extent of $15,000.00, and that hence each of the American Insurance Companies was indebted to the Mexican Insurance Company in that amount.

The Garnishees answered the controverting affidavit as follows:

That it is not true that by reason of the contract of reinsurance existing between these garnishees and the defendant herein, there became due and payable from the garnishees to said defendant the sum of Fifteen Thousand and 00/100 ($15,000.00) Dollars from each of these garnishees; but that to the contrary, the liability of these garnishees to said defendant is solely to indemnify it against any loss or judgment that it might have to pay upon said policy of insurance; that it is not true that these

garnishees each have in their possession the sum of Fifteen Thousand and 00/100 Dollars ($15,000.00) belonging to the defendant, Compania General Anglo-Mexicana de Seguros, S. A.

[fol. 180] These garnishees further respectively show to the court that the only manner in which it is claimed that this court has jurisdiction over the defendant is by these garnishees, and the filing of a certain suit in this court numbered 39643, and entitled 'C. J. Dick versus Compania General Anglo-Mexicana de Seguros, S. A.' in which suit there has been no actual service upon said defendant, but only constructive service by publication, and these garnishees are entitled to urge in this proceeding any defense that the said defendant might urge in said suit numbered 39643, and for such defense these garnishees allege:

That plaintiff and intervener ought not to have or maintain said suit numbered 39643 against said defendant, or have or maintain this garnishment against these garnishees or either of them, because:

1. The policy of insurance mentioned in and declared upon by plaintiff's petition herein, and by the intervener, contained a stipulation and provision reading as follows:

'It is understood and agreed that no judicial suit or demand shall be entered before any tribunal for the collection of any claim under this policy, unless such suits or demands are filed within one year counted as from the date on which such damage occurs.'

That said policy was issued in the Republic of Mexico, and that the above quoted provision thereof was and is valid and enforceable under the laws of the Republic of Mexico, and that said contract was performable and intended to be performed in Mexico, and the clause above quoted is and was void as a defense to any suit brought to recover on said policy after the expiration of one year from the date of the accrual of the cause of action or damage to the vessel mentioned in plaintiff's petition; that this suit was filed within one year from and after the accrual [fol. 181] of said cause of action, and these garnishees here now specially plead said facts and the said provision and stipulation of said policy in bar of plaintiff's cause of action herein asserted against them and in bar of the plaintiff's cause of action asserted in said suit numbered 39643.

2. The contract sued on by plaintiff in said suit numbered 39643 was made in the Republic of Mexico, and intended to be performed in the Republic of Mexico, and was subject to the laws of the said Republic of Mexico, which contain certain provisions in Articles 1038, 1039, and 1043 of the Commercial Code of the Republic of Mexico, and which was in force at the time of the issuance of said policy, and at the time of the accrual of plaintiff's cause of action herein, and which read as follows:

Article 1038. 'The right of action derived from commercial acts shall be subject to prescription in accordance with the provisions of this Code.'

Article 1039. 'The periods fixed for the enforcement of rights of action acrising out of commercial acts shall be fatal except restitution against same is given.'

Article 1043. 'One year shall prescribe actions derived from contracts of life insurance, sea and land.'

That under and by virtue of the above quoted provisions of the Mexican law any cause of action such as that asserted by plaintiff herein is and was barred if no suit was instituted thereon within one year from the date of the accrual thereof, and these garnishees here now specially plead that no suit was instituted on said policy against the said defendant within such one-year period, and plead such fact and the fact that said suit numbered 39643 was not instituted within said one-year period, nor were the garnishments in this proceeding sued out within one year from the accrual of the cause of action, and plead the provisions of [fol. 182] said commercial code of the Republic of Mexico in bar of these garnishments, and of said suit numbered 39643, and pray that they may be hence dismissed.

3. These garnishees further specially plead that the policy delared on by plaintiff in said cause numbered 39643 was void from its inception because it was then represented to the defendant that the value of the vessel alleged to have been insured thereby was in excess of the amount of such policy and these garnishees allege that in fact said representations of plaintiff were not true, and the value of said vessel was not as much as the amount of said policy. .

4. These garnishees allege that said vessel was not a total loss, and that notwithstanding such fact, the said ves-

sel was abandoned by plaintiff without notice to the defendant, in violation of the terms of the policy, and that it was the duty of plaintiff, under the terms of said policy to repair said vessel at the cost and expense of defendant, and defendant is liable, if at all, only for the cost of such repairs, and not for the face of such policy.

The defendant, Mexican Insurance Company, answered in the main suit by pleading the same provisions as to limitation under the Mexican Law, and the provisions of the contract and other defensive matters that were pleaded by the Garnishees, this answer being filed by attorneys appointed by the court to represent the Mexican Insurance Company, which had been cited by publication.

Appellee demurred to all of the allegations of the answers of the Mexican Insurance Company and the Garnishees, which set up contractual limitation and limitation under the laws of the Republic of Mexico. These demurrers were sustained by the court and judgment was rendered against the Mexican Insurance Company for $36,675.00 and against each of the American Insurance Companies, as Garnishees, for $18,337.50. The court filed findings of fact and co-
[fol. 183] clusions of law in both cases, as follows:

I

'I find that on the 18th day of March, 1921, the defendant, the Compania General Anglo-Mexicana de Segros, S. A., issued its policy No. 18098 to Charles B. Bonner of Tampico, Mexico, wherein said company insured the tug R. Waverly, also known as Waverly R, for a period of one year from the last named date, for the sum of Thirty-five thousand ($35,000.00) Dollars, the loss or damage under said policy being payable to the Texas & Gulf Steamship Company and C. J. Dick, as their respective interests might appear; and that the defendant received from the parties interested the full amount of premium demanded for the issuance of said policy.

II

I find that on May 24, 1921, all the right of Charles B. Bonner in said policy was transferred to A. W. Turner, and that on July 8, 1921, all the rights of A. W. Turner in

said policy were transferred to and solely vested in the plaintiff, C. J. Dick.

III

I find that the plaintiff, C. J. Dick, had a beneficial and insurable interest in said vessel, and that said policy hereinabove described, as originally issued was for the benefit of the plaintiff, C. J. Dick, and the Texas & Gulf Steamship Company, according to the respective interests of said parties in said vessel. That thereafter Suderman & Young duly acquired an interest in said policy or the proceeds thereof.

IV

I find that while said policy was in full force and effect, and on the 27th day day of July, 1921, the vessel insured under the policy hereinabove described, took fire and was [fol. 184] burned and sunk in the harbor of Tampico, Mexico, and thereby became and was a total loss, said facts being made known to the insurance company by the proof of total loss required by the policy.

V

I find that on the 29th day of March, 1921, the duly authorized agents of the Home Insurance Company and the Franklin Fire Insurance Company in Mexico City issued notices to said companies that each of them was bound for re-insurance in the sum of Fifteen Thousand ($15,000.00) Dollars under the policy No. 18098, and that said notices of re-insurance and the premiums for same were accepted and acted upon by The Home Insurance Company and the Franklin Fire Insurance Company.

VI

I also find that the plaintiff and interveners have demanded payment of the defendant, and that no payment has ever been made.

VII

I find that C. J. Dick, the plaintiff, left Mexico where he was temporarily sojourning, within about ten days after the total loss of the R. Waverly, and that he has never at any time been a permanent resident of the Republic of Mex-

ico, but that he has at all times been a resident citizen of the State of Texas.

VIII

I find that garnishments were issued in cause No. 39643 and that there is now in the hand of each of the garnishees, The Home Insurance Company and the Franklin Fire Insurance Company, Fifteen Thousand ($15,000.00) Dollars, making a total sum of Thirty Thousand ($30,000.00) Dollars belonging and due to the original defendant, Compania General Anglo-Mexicana de Seguros, S. A., in the hands of said garnishees, together with interest on said sum from December 3, 1923, on which date the garnishees filed their [fol. 185] answers in garnishment wherein they denied that they were indebted to the original defendant Compania General Anglo-Mexicana de Seguros, S. A.

Conclusions of Law

I

I conclude as a matter of law that by reason of the policy and the total loss of said vessel, and the proof of same, the plaintiff and those entitled thereto in connection with the plaintiff should have judgment for the amount of money brought within the jurisdiction of this court by garnishments issued in cause No. 39654.

II

I further conclude that the plaintiff and the interveners, they having agreed among themselves as to the amounts due between them, should have judgment against the garnishees for the sum sequestered by garnishment, and which said sum is found to be due from the garnishees to the original defendant."

The record discloses no action other than by implication on the appellees' demurrers, the judgments going in their favor of the several sums awarded, merely upon general recitations that the law and the facts were with them; joining in common cause, the Insurance Companies, both Mexican and American, assail them, in substance, upon these grounds:

1. The court erred in not sustaining the contractual provision in the main policy involved, which in effect adopted Article 1043 of the Commercial Code of Mexico having like effect, and expressly prohibited suit thereon unless it was brought within one year after the accrual of the cause of action, this provision being valid under the laws of Mexico where the contract was made, and this suit not having been filed within that period;

[fol. 186] 2. The Texas R. S. Article 5545 would violate the Constitution of the United States, Article 1, Section 10, as well as the Fourteenth Amendment thereto, as impairing the obligations of a contract against the appellees and depriving them of their property without due process of law, were it construed to be applicable to the contract sued upon in the main case here, which contained the one year limitation provision referred to;

3. "The court erred in holding that the vessel was a total loss, within the meaning of the policy, and, therefore, erred in holding that appellee was justified in abandoning her, because the facts were totally insufficient to show any such total loss";

4. The court erred in rendering the judgment, because the reinsurance agreements shown were contracts of indemnity only and not of liability.

We conclude that none of these contentions can be sustained. It is true that the policy was made in Mexico, was by its terms to be performed there, and further contained these provisions:

"It is understood and agreed that no judicial suit or demand shall be entered before any tribunal for the collection of any claim under this policy, unless such suits or demands are filed within one year counted as from the date on which such damage occurs". * * *

"The present policy is subjected to the dispositions of the Commercial Code in that it does not alter or modify the stipulations which that same contains."

It is also true that Article 1043 of the Mexican Commercial Code thus referred to provided, "One year shall prescribe actions derived from contracts of life insurance, sea and land", and that this fire occurred July 27, 1921,

these suits on account thereof not having been filed until [fol. 187] October 27, 1923, two and one-fourth years later; but these facts did not require at the learned trial court's hands the enforcement of the Mexican one-year period of limitation, the public policy of Texas, as declared by statute and judicial decision, being the other way; R. S. Article 5545, Ry. v. Hambrick, 97 S. W. 1072; Ry. v. Brice, 110 S. W. 529; Ry. v. Dysart, 130 S. W. 1047, writ of error refused; see also decisions of other American courts in Galliher v. Ins. Co., 150 Ala. 543; 124 Am. St. Rep. 83; Smith v. Association, 112 Va. 192, 70 S. E. 482, 38 L. R. A. (N S) 1019, Campbell v. City, 155 U. S. 283, 39 L. Ed. 617-20.

The statute cited is in this language, the underscoring being our own:

"No person, firm, corporation, association or combination of whatsoever kind shall enter into any stipulation, contract or agreement by reason whereof the time in which to sue thereon is limited to a shorter period than two years. *And no stipulation, contract, or agreement for any shorter limitation in which to sue shall ever be valid in this state.*"

Under this statute and these decisions, we cannot agree with the able counsel for appellants that "Article 5545 does not make unlawful and contains no language showing that it was the intention of the Legislature to make unlawful any contract made in another state valid under the laws of such other state. Giving Article 5545 its literal interpretation it simply makes unlawful the entering into of a contract in this state by which the time to sue thereon is limited to a shorter period than two years. It will not be presumed without express language to such effect that the Legislature intended to prevent in Texas the enforceability of contracts made in another state, containing a provision entirely valid under the laws of such other state," in support of which the leading case relied upon is Railway v. Thompson, 100 Texas, 185.

[fol. 188] On the contrary, we think the quoted provision in this insurance contract must be held to be purely one of limitation, affecting the remedy only—not the substantive part of the agreement—and as such is controlled by and expressly denied enforcement under the quoted law of this state. The distinction between that provision and the one

ruled upon in the Thompson case appellants invoke is not only clearly made in that opinion, but in the later Hambrick case, supra, is reiterated and practically applied, both classes of contractual clauses being there involved; it simply is that stipulations for the giving of notice of a claim for damages under stated conditions constitute a valuable right going to the substance of the contract itself, while those merely undertaking to fix a limitation of time within which suit must be brought thereon are referable only to the mode of its enforcement in the courts of the country; as to the former, the lex loci contractus governs, as to the latter, the lex fori; Ry. v. McIntyre, 82 S. W. 348; Sanger v. Organ Co., 52 S. W. 622; Ry. v. Eddins, 26 S. W. 161; Ry. v. Vandeventer, 107 S. W. 561; 37 C. J. 730-731; Harris v. Balk, 198 U. S. 1027; Carrigan v. Semple, 72 Texas, 306, Bauserman v. Blunt, 147 U. S. 651-4, Tel. Co. v. Purdy, 162 U. S. 334, 40 L. Ed. 991.

The constitutional objections too, we think, have been adversely pre-determined by authorities that must be followed.

In Railway v. Eddins, supra, at page 164 of 26 S. W., Col. 2, the underscoring being our own, the court said:

[fol. 189] "It is the undoubted power of the state to pass laws prescribing periods of limitation in which remedies may be enforced, and to declare that limitation shall not within a certain time affect contracts that are made and entered into within its jurisdiction, or *sought to be enforced there.*"

That doctrine has become the generally accepted one, as the cases cited and discussed by the learned court make manifest.

It has likewise been so widely held that one's constitutional rights are not affected by a statute which either shortens or lengthens the period of limitation, provided the bar under the pre-existing one has not already become perfect, and, in the instance of a reduction of the time, the change is not so great as to practically leave him no remedy at all—in either of which events there would be a deprivation of property without due process of law; Campbell v. Holt, 115 U. S. 620, 29 L. Ed. 483, Landa v. Obert, 78 Texas, 46, Lewis v. Davidson, 51 Texas, at page 257, Smith v. Association, 112 Va. 192, 70 S. E. 482, 38 L. R. A. (N. S.) 1019.

In applying these principles to foreign contracts and statutes, the courts—somewhat illogically, as appears to this court and contrary to what would have been its conclusion upon the facts here, had the question come to it as one of first impression—have gone so far as to hold that in instances where one of the parties leaves the place of the contract before the bar of the foreign statute applicable to it has become complete, and either resumes his prior residence in or first becomes a citizen of another state or country, the limitation statute of the former—as to a cause of action not deriving its existence therefrom—will be inoperative [fol. 190] in the courts of the latter; in other words, that the lex fori still controls and that, too, whether or not the foreign statute, in terms, extinguishes the debt or merely bars the remedy; Canadian Pacific Ry. Co. v. Johnston, 61 Fed. 738, 9 C. C. A. 587, 25 L. R. A. 470 (Aff. 50 Fed. 886); Finnell v. Southern Kansas Ry. Co. 33 Fed. 427; Moores v. Winter, 67 Ark. 189, 53 S. W. 1057; Alexander v. Burnett, 39 S. C. L. 198; Hober v. Steiner, 2 Bing (N. C.) 202, 29 E. C. L. 501, 132 Reprint, 80.

The first cited of these cases is, perhaps, the most nearly analogous one of them upon the facts to that at bar; Johnston, a resident citizen of the State of Vermont, sued the Railway Company in the Vermont courts more than one year after the accident for damages on account of personal injuries received while a brakeman for it on one of its trains in Canada; the statutes of Canada provided:

"Article 2262. The following actions are prescribed in one year * * * For bodily injuries. * * * Art. 2267. In all cases mentioned in articles * * * and 2262, the debt is absolutely extinguished and no action can be maintained after the delay for prescription has expired."

After disposing of other questions, the United States Circuit Court of Appeals said:

"But without attempting to pass upon what may be the effect of the statute under all circumstances, it is sufficient to say that, assuming that it possesses its largest character, and is a statute of extinguishment, it constituted no defense to the suit of this plaintiff in the state of Vermont, because, during the plaintiff's residence in Canada, it had not become operative, and had not extinguished the debt, so far

as courts in states foreign to Canada are concerned. The [fol. 191] injury happened on September 6, 1890. The plaintiff was at that time a citizen of Vermont, but after the injury he remained in Canada until April, 1891, when he returned to his mother's and his own home, in Vermont, and remained there continuously thereafter. When, before a statute of limitations has become operative, by way of extinguishment of the debt, as between two citizens or residents of a state, one of the parties has permanently changed his national domicile, and become a citizen of a foreign state, the statute will not become an absolute bar, as an extinguishment in the courts of such foreign state. It cannot become, in the country to which he has removed, an absolute extinguishment, unless the parties resided in the country of the statute during the whole period of limitation."

In this instance appellee Dick was never a citizen of Mexico, nor did he remain there long enough after the fire for the bar of the Mexican statute of limitation to become complete against his claim.

This rule requiring the continued residence of both parties in the country or state where the contract was made, or the injury done, for the full period of limitation there prescribed, in order to make it controlling rather than the law of the forum, has been adopted by the courts of Texas, as well as those of other jurisdictions; Atchison etc. Ry. Co. v. Mills, 53 Tex. Civ. App., 359, 116 S. W. 852; Smith v. Webb, 181 S. W. 820; Finnell v. Southern Kansas Ry. Co., 33 Fed. 427; Williams v. St. Louis, etc. Ry. Co., 132 Mo. 573, 27 S. W. 387.

Neither can it make any difference that the one-year limitation provision in this contract was valid under the laws of Mexico, because contrary to the expressed public policy of this state, as reflected in its quoted statute on that subject and the cited decisions of its courts; Knott v. Botany Mills, [fol. 192] 179 U. S. 68-9, 45 L. Ed. 90; Asphalt Co. v. Petroleum Co. 222 Fed. 1007; Messersmith v. Fidelity Co., 232 N. Y. 161, 133 N. E. 432, 19 A. L. R. 877; 13 Corpus Juris, 426; Parchem v. Chessman, 49 Mont. 326; 142 Pac. 631, 146 Pac. 469, Ann. Cases, 1916 A. 681.

After a careful review of the evidence touching the matter, we conclude there was no lack of support for the court's

finding that the vessel was a total loss within the meaning of the policy; while there was some testimony tending to indicate a retrieved value after some one had raised and repaired the old hull, even this was controverted, and there was neither a showing as to what the cost of the repairs had been nor as to whether that had in fact been greater than a prudent owner, which seems to be the legal test, would have undertaken; Ins. Co. v. McIntyre, 90 Texas, 170, 37 S. W. 1068, 35 L. R. A. 672; Corbett v. Ins. Co. 155 N. Y. 389, 41 L. R. A. 318; Livermore v. Ins. Co., 1 Mass. 264; 1 Am. & Eng. Ency. of Law (2nd Ed.) 8; Rogers v. Ins. Co., 139 S. W. 265; Ins. Co. v. Fogarty, 19 Wall, 640; Ins. Co. v. Homewood, 122 Pac. 196, 39 L. R. A. (N. S.) 1182.

The contracts of reinsurance of this risk issued by each of the garnishees to the main defendant, alike in substance and effect, were in this form:

"Declaration No. 6

The Home Insurance Company, New York

Please be advised that we have bound reinsurance as follows:

$15,000, U. S. Cy. (Part of $35,000. U. S. Cy.) on 'Waverly R.,' Tug boat, in favor of Chas. B. Bonner, Tampico.

Term: One year from 18th March, 1921, to 18th March, 1922.

Anglo-Mexicana Policy No. 18098. Item No. —. Rate: [fol. 193] 9%. Premium: $1,350.00 U. S. Cy.

Closed Bord. 2."

(Exhibit No. 3.)

To each was also attached what was termed a bordereau, which contained a list of the vessels to which the re-insurance was to attach.

We think these contracts were clearly those of indemnity against liability, not against loss only, and that debts arose under them between the re-insurers and the original insurer immediately upon the happening of the loss by fire under the policy sued on; that being true, and the garnishees being subject to the courts jurisdiction through local agents at Galveston, judgment was properly rendered on the find-

ings against all the defendants; Merc. Co. v. Weber, 191 N. W. 620, 27 A. L. R. 1395; Railway v. Swartz, 115 S. W. 275; 33 Corpus Juris, 61; Ins. Co. v. Ins. Co., 209 U. S. 326, 52 L. Ed. 815.

Affirmed.

Geo. W. Graves, Associate Justice.

[fols. 194-198] Motion for rehearing, covering five pages, filed May 17, 1928, omitted from this print. It was denied and nothing more by order May 24, 1928.

[fol. 199] In Court of Civil Appeals of Texas

No. 9206, 9156, 9157

[Title omitted]

Order Overruling Motion for Rehearing—May 24, 1928

"It is ordered that the motion of the appellants in these causes for rehearing be refused."

[fol. 200] In Supreme Court of Texas

The Home Insurance Company et al., Plaintiffs in Error,

vs.

C. J. Dick et al., Defendants in Error

Compania General Anglo-Mexicana de Seguros. S. A., Plaintiff in Error,

vs.

C. J. Dick, Defendant in Error

Petition for Writ of Error.—Filed Jun. 23, 1928

To the Supreme Court of Texas:

Your Petitioners, The Home Insurance Company and The Franklin Fire Insurance Company and Compania General

Anglo-Mexicana De Seguros, S. A., respectfully petition the Court for a writ of error to the Honorable, the Court of Civil Appeals for the First Supreme Judicial District of Texas at Galveston for revision and correction of the judgment rendered in two certain consolidated causes pending in that court on appeal from the District Court of Galveston County, Texas, for the Fifty-sixth Judicial District, wherein your Petitioners were appellants and C. J. Dick, Texas & Gulf Steamship Company and Suderman & Young were appellees, in which said cause on April 19th, 1928, the said Court of Appeals affirmed the Judgment of the District Court of Galveston County against your Petitioner and your Petitioners' motion for rehearing was overruled on the 31st day of May, 1928.

[fol. 201] Brief Statement of the Case

The following statement of the case taken from appellants' brief in the Court of Civil Appeals and adopted by the Court of Civil Appeals in its opinion is correct.

A statement in these causes, which have been submitted and considered as one, acquiesced in by the appellees as being correct, is thus taken in full from the brief for appellants:

"C. J. Dick filed suit in the district court of Galveston County against Compania General Anglo-Mexicana De Seguros, S. A. (which will hereafter be called for brevity sake, 'the Mexican Insurance Company'), to recover $35,000 on a policy of insurance issued by the Mexican Insurance Company on the tug 'R Waverly', alleging that the vessel has caught on fire in Tampico, Mexico, and become a total loss, and that thereby the policy matured for the face thereof. The Mexican Insurance Company was a corporation incorporated under the laws of Mexico and had no agent in this State. Appellee, Dick, sued out ancillary writs of garnishment against the Home Insurance Company and The Franklin Fire Insurance Company, as garnishees of the Mexican Insurance Company. The Home Insurance Company and the Franklin Fire Insurance Company will hereafter be designated 'The American Insurance Companies.' The affidavit for garnishment was in statutory form.

In as much as many of the questions presented in these appeals are common to both the Mexican Insurance Company and the American Insurance Companies, this brief will be presented for all of them, with such additional portions as may be applicable to the Garnishees alone.

The Texas & Gulf Steamship Company and Suderman & Young were allowed to intervene in the suits. The American Insurance Companies, as garnishees, answered, denying any indebtedness to the Mexican Insurance Company. [fol. 202] The plaintiff filed a controverting affidavit alleging that each of the American Insurance Companies was indebted to the Mexican Insurance Company in the sum of $15,000.00, on the ground that shortly after the issuance of the policy by the Mexican Company it had reinsured its obligation assumed thereby with each of the American Companies to the extent of $15,000.00, and that hence each of the American Insurance Companies was indebted to the Mexican Insurance Company in that amount.

The Garnishees answered the controverting affidavit as follows:

That it is not true that by reason of the contract of reinsurance existing between these garnishees and the defendant herein, there became due and payable from the garnishees to said defendant the sum of Fifteen Thousand and 00/100 ($15,000.00) Dollars from each of these garnishees; but that to the contrary, the liability of these garnishees to said defendant is solely to indemnify it against any loss or judgment that it might have to pay upon said policy of insurance; that it is not true that these garnishees each have in their possession the sum of Fifteen Thousand and 00/100 Dollars ($15,000.00) belonging to the defendant, Compania General Anglo-Mexicana De Seguros, S. A.

These garnishees further respectfully show to the court that the only manner in which it is claimed that this court has jurisdiction over the defendant is by these garnishees, and the filing of a certain suit in this court numbered 39643 and entitled 'C. J. Dick versus Compania General Anglo-Mexicana De Seguros', in which suit there has been no actual service upon said defendant, but only constructive service by publication, and these garnishees are entitled to urge in this proceeding any defense that the said defendant might urge in said suit numbered 39643, and for such defense these garnishees allege:

[fol. 203] That plaintiff and intervener ought not to have or maintain said suit numbered 39643 against said defendant, or have or maintain this garnishment against these garnishees or either of them, because:

1. The policy of insurance mentioned in and declared upon by plaintiff's petition herein, and by the intervener, contained a stipulation and provision reading as follows:

'It is understood and agreed that no judicial suit or demand shall be entered before any tribunal for the collection of any claim under this policy, unless such suits or demands are filed within one year counted as from the date on which such damage occurs'.

That said policy was issued in the Republic of Mexico, and that the above quoted provision thereof was and is valid and enforceable under the laws of the Republic of Mexico, and that said contract was performable and intended to be performed in Mexico, and the clause above quoted is and was valid as a defense to any suit brought to recover on said policy after the expiration of one year from the date of the accrual of the cause of action or damage to the vessel mentioned in plaintiff's petition; that this suit was filed within one year from and after the accrual of said cause of action, and these garnishees here now specially plead said facts and the said provisions and stipulation of said policy in bar of plaintiff's cause of action herein asserted against them and in bar of the plaintiff's cause of action asserted in said suit numbered 39643.

2. The contract sued on by plaintiff in said suit numbered 39643 was made in the Republic of Mexico, and intended to be performed in the Republic of Mexico, and was subject to the laws of said Republic of Mexico, which con-[fol. 204] tain certain provisions in Articles 1038, 1039, and 1043 of the Commercial Code of the Republic of Mexico, and which was in force at the time of the issuance of said policy, and at the time of the accrual of plaintiff's cause of action herein, and which read as follows:

Article 1038. 'The rights of action derived from commercial acts shall be subject to prescription in accordance with the provisions of this Code'.

Article 1039. 'The periods fixed for the enforcement of rights of action arising out of commercial acts shall be fatal except restitution against same is given'.

Article 1043. 'One year shall prescribe actions derived from contracts of life insurance, sea and land'.

That under and by virtue of the above quoted provisions of the Mexican laws, any cause of action such as that asserted by plaintiff herein is and was barred if no suit was instituted thereon within one year from the date of the accrual thereof, and these garnishees here now specially plead that no suit was instituted on said policy against the said defendant within such one-year period, and plead such fact and the fact that said suit numbered 39643 was not instituted within said one-year period, nor were the garnishments in this proceeding sued out within one year from the accrual of the cause of action, and plead the provisions of said commercial code of the Republic of Mexico in bar of these garnishments, and of said suit numbered 39643, and pray that they may be hence dismissed.

3. These garnishees further specially plead that the policy declared on by plaintiff in said cause numbered 39643 was void from its inception because it was then represented to the defendant that the value of the vessel alleged to have been insured thereby was in excess of the amount of such policy and these garnishees allege that in [fol. 205] fact said representations of plaintiff were not true, and the value of said vessel was not as much as the amount of said policy.

4. These garnishees allege that said vessel was not a total loss, and that notwithstanding such fact, the said vessel was abandoned by plaintiff without notice to the defendant in violation of the terms of the policy, and that it was the duty of plaintiff, under the terms of said policy to repair said vessel at the cost and expense of defendant, and defendant is liable, if at all, only for the cost of such repairs, and not for the face of such policy.

The defendant, Mexican Insurance Company, answered in the main suit by pleading the same provisions as to limitation under the Mexican Law, and the provisions of the contract and other defensive matters that were pleaded by the Garnishees, this answer being filed by attorneys appointed by the court to represent the Mexican Insurance Company, which had been cited by publication.

Appelle demurred to all of the allegations of the answers of the Mexican Insurance Company, and the garnishees, which set up contractual limitation and limitation under the laws of the Republic of Mexico. These demurrers were sustained by the court and judgment was rendered against the Mexican Insurance Company for $36,675.00, and against each of the American Insurance Companies, as garnishees for $18,337.50. The court filed findings of fact and conclusions of law in both cases, as follows:

I

'I find that on the 18th day of March, 1921, the defendant, the Compania General Anglo-Mexicana de Seguros, S. A., issued its policy No. 18098 to Charles B. Bonner of Tampico, Mexico, wherein said company insured the tug R. Waverly, also known as Waverly R. for a period of one [fol. 206] year from the last named date, for the sum of Thirty-five thousand ($35,000.00) Dollars, the loss or damage under said policy being payable to the Texas & Gulf Steamship Company and C. J. Dick, as their respective interests might appear; and that the defendant received from the parties interested the full amount of premium demanded for the issuance of said policy.

II

I find that on May 24, 1921, all the right of Charles B. Bonner in said policy was transferred to A. W. Turner, and that on July 18, 1921, all the rights of A. W. Turner in said policy were transferred to and solely vested in the plaintiff, C. J. Dick.

III

I find that the plaintiff, C. J. Dick, had a beneficial and insurable interest in said vessel, and that said policy hereinabove described, as originally issued was for the benefit of the plaintiff, C. J. Dick, and the Texas & Gulf Steamship Company, according to the respective interests of said parties in said vessel. That thereafter Suderman & Young duly acquired an interest in said policy or the proceeds thereof.

IV

I find that while said policy was in full force and effect, and on the 27th day of July, 1921, the vessel insured under the policy hereinabove described took fire and was burned and sunk in the harbor at Tampico, Mexico, and thereby became and was a total loss, said facts being made known to the insurance company by the proof of total loss required by the policy.

[fol. 207] V

I find that on the 29th day of March, 1921, the duly authorized agents of the Home Insurance Company and the Franklin Fire Insurance Company in Mexico City issued notices to said companies that each of them was bound for re-insurance in the sum of Fifteen Thousand ($15,000.00) Dollars under the policy No. 18098, and that said notices of re-insurance and the premiums for the same were accepted and acted upon by The Home Insurance Company and the Franklin Fire Insurance Company.

VI

I also find that the plaintiff and interveners have demanded payment of the defendant, and that no payment has ever been made.

VII

I find that C. J. Dick, the plaintiff, left Mexico where he was temporarily sojourning, within about ten days after the total loss of the R. Waverly, and that he has never at any time been a permanent resident of the Republic of Mexico, but that he has at all times been a resident citizen of the State of Texas.

VIII

I find that garnishments were issued in cause No. 49643 and that there is now in the hand of each of the garnishees, The Home Insurance Company and the Franklin Fire Insurance Company, Fifteen Thousand ($15,000.00) Dollars, making a total sum of Thirty Thousand ($30,000.00) Dollars belonging and due to the original defendant, Compania

General Anglo-Mexicana de Seguros, S. A., in the hands of said garnishees, together with interest on said sum from December 3, 1923, on which date the garnishees filed their answers in garnishment wherein they denied that they were indebted to the original defendant Compania General Anglo-Mexicana de Seguros, S. A.

[fol. 208] Conclusions of Law

I

I conclude as a matter of law that by reason of the policy and the total loss of said vessel, and the proof of same, the plaintiff and those entitled thereto in connection with the plaintiff should have judgment for the amount of money brought within the jurisdiction of this Court by garnishments issued in cause No. 39654.

II

I further conclude that the plaintiff and the interveners, they having agreed among themselves as to the amounts due between them, should have judgment against the garnishees for the sum sequestered by garnishment, and which said sum is found to be due from the garnishees to the original defendant."

The record discloses no action other than by implication on the appellees' demurrers, the judgments going in their favor for the several sums awarded, merely upon general recitations that the law and the facts were with them; joining in common cause, the Insurance Companies both Mexican and American, assail them, in substance, upon these grounds:

1. The court erred in not sustaining the contractual provision in the main policy involved, which in effect adopted Article 1043 of the Commercial Code of Mexico having like effect, and expressly prohibited suit thereon unless it was brought within one year after the accrual of the cause of action, this provision being valid under the laws of Mexico where the contract was made, and this suit not having been filed within that period;

2. The Texas R. S., Article 5545 would violate the Constitution of the United States, Article 1, Section 10, as well as the Fourteenth Amendment thereto, as impairing the [fol. 209] obligations of a contract against the appellees and depriving them of their property without due process of law, were it construed to be applicable to the contract sued upon in the main case here, which contained the one year limitation provision referred to;

3. "The court erred in holding that the vessel was a total loss, within the meaning of the policy, and, therefore, erred in holding that appellee was justified in abandoning her, because the facts were totally insufficient to show any such total loss";

4. The court erred in rendering the judgments, because the reinsurance agreements shown were contracts of indemnity only and not of liability.

This petition for writ of error is presented in behalf of both the Garnishees, the American Insurance Companies and the original defendant, the Mexican Insurance Company.

Grounds of Jurisdiction

(1)

This is a case involving the construction or the validity of a statute of the State of Texas, namely, Article 5545 of the Revised Statutes of 1925, reading, "No person, firm, corporation, association or combination of whatsoever kind shall enter into any stipulation, contract or agreement, by reason whereof the time in which to sue thereon is limited to a shorter period than two years. And no stipulation, contract or agreement for any such shorter limitation in which to sue shall ever be valid in this state".

The Court of Civil Appeals construed Article 5545 as applying to an insurance contract made in Mexico and intended to be enforced in Mexico and held that the statute rendered such contractual provision void. Plaintiffs in Error attacked the validity of such statute as applicable to [fol. 210] such contract made in a foreign country.

The Court of Civil Appeals construed Article 5545 as rendering void and inapplicable in a suit brought in the State of Texas the provisions of the Mexican Commercial

Code prohibiting suit on such a contract as was involved in this case more than one year after the cause of action accrued and sustained the validity of Article 5545 as applicable to such a cause of action and as striking down the provisions of the Mexican Code.

The Court of Civil Appeals sustained the validity of Article 5545 in this case against the contention of plaintiffs in error that it was violative of the Constitution of the United States, Article I, Section 10, and the Fourteenth Amendment to the Constitution of the United States, as impairing the obligations of a contract against Plaintiffs in Error and as depriving them of their property without due process of law.

(2)

This is a case in which errors of law have been committed by the Court of Civil Appeals of such importance to the jurisprudence of the State as should require correction, as set out in the preceding Subdivision of this application and also in:

(a) Holding that the Tug "Waverly R" was a total loss, within the meaning of the policy, and that, therefore, appellee was justified in abandoning her because the facts were totally insufficient to show any total loss; and

(b) In affirming the judgment in favor of defendants in error against plaintiffs in error, because no judgment could be rendered against the Mexican Company cited by publication and a non-resident of Texas, unless there was a valid garnishment and the garnishment could not be held valid on the ground that there was any indebtedness of the gar- [fol. 211] nishees to the Mexican Company until and unless a valid judgment was rendered against the Mexican Company; therefore, the garnishees were not subject to garnishment because the re-insurance agreements were contracts of indemnity and not of liability.

All of the above grounds were presented in the Court of Civil Appeals and in the motion for rehearing filed by plaintiffs in error therein.

First Assignment of Error, Which is Presented as a Proposition

The policy upon which the main suit against the Mexican Company was based containing a contractual provision prohibiting suit thereon unless brought within one year from the date of the accrual of the cause of action, and this suit not having been filed within such period, and it being admitted by the demurrer filed by the defendants in error that such provision was valid under the laws of Mexico, where the contract was made, the Court of Civil Appeals erred in holding that this suit could be maintained, and in affirming the judgment against the Mexican Company and the American Companies as Garnishees, and erred in not sustaining the validity of such contractual provision.

Second Assignment of Error, Which is presented as a Proposition

The Court of Civil Appeals erred in giving Article 5545 the construction that it is applicable to a contract made under the laws of a foreign country containing a stipulation shortening the time for the bringing of suit thereon to less than two years, such stipulation being valid under the laws of such foreign country, because to give it such construction would make it unconstitutional in that it would [fol. 212] violate Article I, Section 10 of the Constitution of the United States, in that it would thereby impair the obligation of a contract and would violate the Fourteenth Amendment to the Constitution of the United States, in that it would thereby impair the obligation of a contract and would violate the Fourteenth Amendment to the Constitution of the United States, in that it would deprive the defendant and the garnishees of property without due process of law.

Third Assignment of Error, Which is Presented as a Proposition

The Court of Civil Appeals erred in holding that the court below correctly sustained the demurrer of appellees to the answers of garnishees and the Mexican Insurance

Company pleading the provisions of the laws of Mexico prohibiting suit filed more than one year after the cause of action accrued.

Additional Proposition under Above Assignment

Where a contract made in another jurisdiction expressly incorporates as a part thereof the laws of such other jurisdiction, such laws become a binding part of the contract and are not affected by a statute of the state of the forum, which if given effect in such a case would nullify the law of the place of the making of the contract.

Fourth Assignment of Error, Which is Presented as a Proposition

The Court of Civil Appeals erred in holding that the trial court did not err in rendering judgment in favor of defendants in error against plaintiffs in error. The Mexican Insurance Company and the garnishees, because no judgment could be rendered against the Mexican Insurance Company cited by publication and a non-resident of Texas, unless there was a valid garnishment and the garnishment could not be valid on the ground that there was any indebtedness of the garnishees to the Mexican Insurance Company until and unless a valid judgment was rendered against the Mexican Company, and, therefore, the garnishees were not subject to garnishment.

[fol. 213] Fifth Assignment of Error, Which is Presented as a Proposition

The Court of Civil Appeals erred in holding that the vessel which was the subject of the insurance contract sued on was a total loss, within the meaning of the policy, and therefore, erred in holding that defendant in error, C. J. Dick, was justified in abandoning her because the facts were totally insufficient to show any total loss.

Argument under the Foregoing Assignments of Error

Applicable to First Assignment of Error

The Court is respectfully referred to Subsivision 1 of the Argument contained in the brief of plaintiffs in error filed

in the Court of Civil Appeals, which will be found on pages 9, 10, 11 and 12 of said brief, and which we understand will be considered under Subdivision (j) of Rule 1.

Applicable to Third Assignment of Error

Plaintiffs in error pleaded the provisions of the Mexican Commercial Code as follows:

"Article 1038. 'The rights of action derived from commercial acts shall be subject to prescription in accordance with the provisions of this Code.'

Article 1039. 'The periods fixed for the enforcement of rights of action arising out of commercial acts shall be fatal except restitution against same is given.'

Article 1043. 'One year shall prescribe actions derived from contracts of life insurance, sea and land.' "

[fol. 214] The policy sued on in this case is fully set out in the stipulation of the parties and shown on pages 22 to 30 of the Statements of Facts. We invite the particular attention of the court to the fact that the policy was made in Mexico, covered a vessel located in Mexico, and was intended to be performed in Mexico, and to the provision of the policy shown on page 30 of the statement of facts, reading as follows:

"The present policy is subjected to the dispositions of the Commercial Code in that it does not alter or modify the stipulations which that same contains."

We submit that the above quoted provision of the policy expressly adopts the applicable provisions of the Mexican Commercial Code as a part of this policy. This being true, the contract made in Mexico expressly incorporates the law of the situs of the contract and such law becomes a binding part of the contract. Williston on Contracts, Vol. 2, Section 615. Manvell vs. Weaver, 102 Pac., 36; Long vs. Owen, 121 Pac., 99; Lorando vs. Gathero, 117 N. E. 188; Union National Bank vs. Chapman, 62 N. T. 672.

Applicable to Fourth Assignment of Error

It is the contention of plaintiffs in error that the entire judgment is invalid, both as to the Mexican Insurance Com-

pany and the garnishees, because the Mexican Insurance Company having been cited by publication, no judgment can be rendered against it, unless by virtue of a valid judgment, or garnishment. The garnishment can not be sustained, unless there was a valid debt by the garnishees to the Mexican Insurance Company. After the insurance policy sued on was issued by the Mexican Insurance Company, William B. Woodrow & Company, Insurance Underwriters and Adjusters, issued the following binder in behalf of the Home Insurance Company:

[fol. 215] "Declaration No. 6

The Home Insurance Company, New York

Please be advised that we have bound reinsurance as follows:

$15,000, U. S. Cy. (Part of $35,000. U. S. Cy.), on "Waverly R.," Tug boat, in favor of Chas. B. Bonner, Tampico.

Term: One year from 18th March, 1921, to 18th March, 1922.

Anglo-Mexicana Policy No. 18098. Item No. —. Rate: 9%. Premium: $1,350.00, U. S. Cy.

Closed Bord. 2."

Exhibit No. 3.

(S. of F. pp. 32-33), and a similar binder in behalf of The Franklin Fire Insurance Company (S. F. p. 33).

In the bordereau attached to the binders there was a list of vessels to which the re-issuance was to attach (S. F. pp. 37-40).

The most that can be said from the binders and the bordereau is that there was a re-insurance contract, by which the Mexican Company reinsured with the garnishees its risk under the policy sued on. There are no provisions in the binder or bordereau which are helpful in determining what the relations of the parties were.

It is clear that as in every other contract of reinsurance there is no privity between the assured and the reinsurers. The insured could not have maintained an action direct against the reinsurers.

There is no question but that there are many contracts (not of reinsurance, however) which make the surety liable

as soon as and whenever any facts exist which make the principal liable. A contract of reinsurance is not, however, [fol. 216] such a contract. It is a contract of indemnity merely. A contract of indemnity may indemnify the contractee against liablity or against loss. In either event, however, the result is the same, except that in the first instance the contractee or indemnitee need not have paid the loss, while in the second instance he must have paid the loss in order to hold the indemnitor liable. It has been held by authority of the highest repute that a reinsurance contract is a contract of insurance against liability, and not against the satisfaction of a loss. This, however, does not deprive the contract of its character as one of indemnity. The leading case in the country is Allemannia Insurance Company vs. Firemen's Insurance Company, 209 U. S. 326. In that case the reinsured company had become insolvent and the Supreme Court of the United States held that the re-insurer was liable to the Receiver of the re-insured under a contract of re-insurance, although the Receiver had not paid the assured in the policies. At page 332 of the opinion the court said:

"The contract is one of indemnity to the person or corporation reinsured and it binds the reinsurer to pay to the reinsured the whole loss sustained in respect to the subject of the insurance to the extent to which he is reinsured. It is not necessary that the reinsured should first pay the loss to the party first insured before proceeding against the reinsurer upon his contract. The liability of the latter is not affected by the insolvency of the insured or by its inability to fulfull its own contract with the original insured. The claim of the reinsured rests upon its liabiliy to pay its loss to the original insured and is not based upon the greater or less ability to pay by the reinsured."

We call particular attention to the words last quoted, namely, that the claim of the reinsured (against the reinsurer) rests upon the liability of the reinsured to pay its loss to the original assured. This language is particularly applicable to the point which we are now presenting to this court. No valid judgment could be rendered against the garnishees. In this case until there was a valid judgment [fol. 217] rendered against the Mexican Company, which

was the reinsured. The American Companies owed no debt of any kind to the Mexican Company until liability was fixed on the Mexican Company for the loss of the vessel involved. The mere fact that the vessel may have burned in whole or in part did not fix liability on the Mexican Company. There may have been a dozen different defenses under the Mexican law as against such liability. Certainly the defense of the provisions of the Mexican Commercial Code referred to in the earlier portion of this brief would have been good in a suit in Mexico. No court has held that in a contract of reinsurance the mere existence of facts which may or may not create a liability on the part of the reinsured give a rise to a debt of the reinsurer to the reinsured. It is true that reinsurance contracts are not construed to be contracts of indemnity against loss because the reinsured does not have to pay the loss before holding the reinsurer liable, but the loss must be asserted and fixed against the reinsured before the reinsurer can be held liable.

Applying the above argument to the facts of this case, no no valid judgment could be rendered against the Mexican Company on service by publication standing alone. The only way that such a judgment could be valid would be by attaching some of the Mexican Company's property in this state (and there was no such property), or by garnisheeing a person found in Texas who owed a debt to the Mexican Company. Appellee's suits are based upon the proposition, and can be based only upon the proposition that there was a valid debt of the American Companies to the Mexican Company until there was a liability on the part of the Mexican Company to the assured. Thus the argument proceeds in a circle. Appellees are forced to the position that their judgment against the Mexican Company is valid because [fol. 218] they have impounded a debt due by the American Companies to the Mexican Company, and that they have impounded such a debt because they have a valid judgment against the Mexican Company.

There are respectable authorities which hold that no garnishment can lie in this case where the situs of the debt was not in the state of the forum. Smith vs. Tabor, 16 T. C. A., 154, 40 S. W. 156; Central Trust Company vs. Chattanooga, etc. Railway Company, 68 Fed. 685; Douglass

vs. Phoenix Insurance Company, 138 N. Y. 209, 38 N. E. 938.

Applicable to Fifth Assignment of Error

The court is respectfully referred to Subdivision 4 of the argument contained in the briefs of Plaintiffs in Error in the Court of Civil Appeals appearing on pages 13 to 21 of their brief in that court, which is asked to be considered in connection with this assignment of error.

Your petitioners respectfully pray that this petition be granted, and the writ of error allowed for the correction of the errors of law herein complained of, and that upon hearing the judgments of the Court of Civil Appeals and the District Court be reversed and judgment rendered in favor of plaintiffs in error.

Messrs. Hughes, Lockhart & Hughes, Williams, Neethe & Williams and John L. Darrouzet, all of Galveston, Texas, are Attorneys of Record for Defendants in Error, and a copy of this Application is lodged in the office of the Clerk [fol. 219] of the Court of Civil Appeals for their use.

Respectfully submitted.

Terry, Cavin & Mills, Attorneys for Plaintiffs in Error.

[File endorsement omitted.]

In Supreme Court of Texas

[Title omitted]

Order Refusing Writ of Error—Dec. 15, 1928

This day came on to be heard the application of plaintiff in error for a writ of error to the Court of Civil Appeals for the First Dist. and the same having been duly considered, it is ordered that the appln. be refused; that applicants, The Home Ins. Co. and its surety, Globe Indemnity Company, and Franklin Fire Ins. Co. and surety, Globe Indemnity Company, pay all costs incurred on this appln.

[fol. 220] IN SUPREME COURT OF TEXAS

[Title omitted]

MOTION FOR REHEARING—Filed Dec. 29, 1928

To the Supreme Court of Texas:

Now come The Home Insurance Company and The Franklin Fire Insurance Company and Compania General Anglo-Mexicana De Seguros, S. A., and respectfully move the Court to grant them a rehearing of their application for Writ of Error filed in the above numbered and entitled consolidated causes and to set aside the order of this court entered on the 15th day of December, 1928, refusing your petitioners' application for writ of error, and, for grounds of this motion, these petitioners respectfully show:

1. This Honorable Court erred in failing and refusing to grant your petitioners' application for writ of error on the grounds set out in the first assignment of error, which is as follows:

"The policy upon which the main suit against the Mexican Company was based containing a contractual provision prohibiting suit thereon unless brought within one year [fol. 221] from the date of the accrual of the cause of action, and this suit not having been filed within such period, and it being admitted by the demurrer filed by the defendants in error that such provision was valid under the laws of Mexico, where the contract was made, the Court of Civil Appeals erred in holding that this suit could be maintained, and in affirming the judgment against the Mexican Company and the American Companies as Garnishees, and erred in not sustaining the validity of such contractual provision."

2. This Honorable Court erred in failing and refusing to grant your Petitioners' application for writ of error on the grounds set out in the second assignment of error, which is as follows:

"The Court of Civil Appeals erred in giving Article 5545 the construction that it is applicable to a contract made under the laws of a foreign country containing a

stipulation shortening the time for the bringing of suit thereon to less than two years, such stipulation being valid under the laws of such foreign country, because to give it such construction would make it unconstitutional in that it would violate Article I, Section 10 of the Constitution of the United States, in that it would thereby impair the obligation of a contract and would violate the Fourteenth Amendment to the Constitution of the United States, in that it would deprive the defendant and the garnishees of property without due process of law."

3. This Honorable Court erred in failing and refusing to grant your petitioners' application for writ of error on the grounds set out in the third assignment of error, which is as follows:

"The Court of Civil Appeals erred in holding that the court below correctly sustained the demurrer of appellees to the answers of garnishees and the Mexican Insurance [fol. 222] Company pleading the provisions of the laws of Mexico prohibiting suit filed more than one year after the cause of action accrued."

4. This Honorable Court erred in failing and refusing to grant plaintiffs in error's petition for writ of error herein on the grounds set out in their additional proposition under the third assignment of error, which additional proposition is as follows:

"Where a contract made in another jurisdiction expressly incorporates as a part thereof the laws of such other jurisdiction, such laws become a binding part of the contract and are not affected by a statute of the state of the forum, which if given effect in such a case would nullify the law of the place of the making of the contract."

5. This Honorable Court erred in failing and refusing to grant your petitioners' application for writ of error on the grounds set out in the fourth assignment of error, which is as follows:

"The court of Civil appeals erred in holding that the trial court did not err in rendering judgment in favor of defendants in error against plaintiffs in error, the Mexican Insurance Company and the garnishees, because no judg-

ment could be rendered against the Mexican Insurance Company cited by publication and a non-resident of Texas, unless there was a valid garnishment and the garnishment could not be valid on the ground that there was any indebtedness of the garnishees to the Mexican Insurance Company until and unless a valid judgment was rendered against the Mexican Company, and, therefore, the garnishees were not subject to garnishment."

6. This Honorable Court erred in failing and refusing to grant your petitioners' application for writ of error on the grounds set out in the fifth assignment of error, which is as follows:

[fol. 223] "The Court of Civil Appeals erred in holding that the vessel which was the subject of the insurance contract sued on was a total loss, within the meaning of the policy, and, therefore, erred in holding that defendant in error, C. J. Dick, was justified in abandoning her because the facts were totally insufficient to show any total loss."

Plaintiffs in error reiterate all of the arguments, authorities and grounds set out in their original petition for writ of error and in their brief filed in the Court of Civil Appeals and respectfully ask that this motion for rehearing be granted and that their petition for writ of error be granted.

Respectfully submitted.

Terry, Cavin & Mills, Attorneys for Petitioners.

[fol. 224] IN SUPREME COURT OF TEXAS

[Title omitted]

ORDER GRANTING MOTION FOR REHEARING AND GRANTING WRIT OF ERROR—January 23, 1929

It is ordered by the Court that the Motion for rehearing herein by the plff. in error be granted and the judgment of this court as entered in the Minutes of Dec. 15th, 1928, refusing the appln. be vacated and set aside and the following judgment be entered in lieu thereof:

This day came on to be heard the appln. of plff. in error for a writ of error to the Court of Civil Appeals for the First Dist., and the same having been duly considered, it is ordered that the appln. be granted and the writ of error issue as prayed for.

[fol. 225] IN SUPREME COURT OF TEXAS

April 10th, 1929.

No. 5265, No. 1235

THE HOME INSURANCE COMPANY (Compania General Anglo-Mexicana de Seguros, S. A.) et al.

vs.

C. J. DICK et al.

From Galveston Co., 1st Dist.

JUDGMENT—April 10, 1929

This cause having been referred to the Commission of Appeals for their examination and report and said Commission having reported in a written opinion by Hon. Richard Critz, Judge of Section "A", that there was no error in the judgments of the Court of Civil Appeals and District Court, and recommending that said judgments be affirmed, and said report together with the record in the cause having been duly considered and the judgment as recommended by the Commission of Appeals having been approved by the Court, it is therefore ordered, adjudged and decreed that the judgments of the Court of Civil Appeals and District Court be in all things affirmed; that the defendants in error, C. J. Dick, Texas & Gulf Steamship Company and Suderman & Young, Inc., do have and recover of and from the plaintiffs in error, The Home Insurance Company and its surety, Globe Indemnity Company, and of The Franklin Fire Insurance Company and its surety, Globe Indemnity Company, the sum or sums adjudged to them or each of them in the District Court. It is further ordered that the plaintiffs in error, The Home Insurance

Company, The Franklin Fire Insurance Company, and the Compania General Anglo-Mexicana De Seguros, S. A. and their surety, Globe Indemnity Company, pay all costs in this behalf expended in this Court, the Commission of Appeals, and Court of Civil Appeals, and this decision be certified to the District Court for observance.

[fol. 226] IN SUPREME COURT OF TEXAS

Commission of Appeals, Section A

No. 1235, 5265

[Title omitted]

OPINION—Filed April 10, 1929

Statement of the Case

C. J. Dick filed suit in the District court of Galveston County, Texas, against Compania General Anglo-Mexicana de Seguros, S. A., hereinafter called the Mexican Company, to recover $35,000 on a policy of fire insurance issued by the Mexican Company on a boat of some character. It is alleged, and found by the trial court, that the boat was totally destroyed by fire and sunk in the harbor of Tampico, Mexico, on July 27, 1921, while the policy of fire insurance was in force. The Mexican Company was a corporation incorporated under the laws of the Republic of Mexico, and had no agent in this state. This company was cited in this cause by publication as provided under our statutes, and attorneys were appointed by the trial court to represent it. Said Mexican Company answered by and through said attorneys alone.

Dick, the plaintiff in the original suit, sued out ancillary writs of garnishment against Home Insurance Company and Franklin Fire Insurance Company, with whom the Mexican Company had re-insured the risk, as garnishees of the Mexican Company. The two garnishees are both American companies doing business in this state, and were duly served by service on their local agents as required by the Texas statutes. The Texas & Gulf Steamship Com-

[fol. 227] pany and Suderman & Young were allowed to intervene in the suit on grounds we are not here interested in.

On final trial in the District court, judgment was rendered against the Mexican Company for $36,675.00, and against each of the garnishees for one-half that amount, $18,337.50. The cases were duly appealed to the Court of Civil Appeals for the First District at Galveston, which court in all things affirmed the judgment of the trial court. 8 S. W. (2d) 354. The cause is now before this court on writ of error granted on application of the three insurance companies.

The Court of Civil Appeals makes a very full and complete statement of the issues involved in this case, and as such issues require a very extended statement, for the sake of brevity, we refer to the statement made by the Court of Civil Appeals, 8 S. W. (2d) pp. 355 to 357, inclusive.

Opinion

The first assignment of error of the three insurance companies is as follows:

"The policy upon which the main suit against the Mexican Company was based containing a contractual provision prohibiting suit thereon unless brought within one year from the date of the accrual of the cause of action, and this suit not having been filed within such period, and it being admitted by the demurrer filed by the defendants in error that such provision was valid under the laws of Mexico, where the contract was made, the Court of Civil Appeals erred in holding that this suit could be maintained, and in affirming the judgment against the Mexican Company and the American Companies as garnishees, and erred in not sustaining the validity of such contractual provision."

[fol. 228] As shown by the pleadings of the Mexican Company, and the garnishees, the original insurance policy constituted a contract entered into in the Republic of Mexico, and contained the following stipulation:

"It is understood and agreed that no judicial suit or demand shall be entered before any tribunal for the col-

lection of any claim under this policy, unless such suits or demands are filed within one year counted as from the date on which such damage occurs."

"The present policy is subjected to the dispositions of the commercial code in that it does not alter or modify the stipulations which that same contains."

The insurance companies then pleaded Articles 1038, 1039 and 1043, of the Mexican Commercial Code, which read as follows:

Article 1038. "The rights of action derived from commercial acts shall be subject to prescription in accordance with the provisions of this code."

Article 1039. "The periods fixed for the enforcement of rights of action arising out of commercial acts shall be fatal except restitution against the same is given."

Article 1043. "One year shall prescribe actions derived from contracts of life insurance, sea and land."

It will be seen from the above facts that the policy of fire insurance made the basis of this suit was barred by the statutes of limitation of the Republic of Mexico, at the time the suit was filed in the district court of Galveston County, Texas, but was not barred by any statute [fol. 229] of limitation in this state. It therefore follows that if the laws of limitation of Mexico, the place where the contract was made, must govern, then the pleas of limitation of the insurance companies should be sustained, but on the other hand, if the laws of Texas, the lex forum, should govern, then the insurance companies are liable.

We are of the opinion that it is the settled law of this state that the contractual and statutory limitations pleaded by the insurance companies, lawful in the Republic of Mexico, are unenforceable in this state because they are contrary to the statutory laws of Texas, and to the public policy of this state as expressed by the statutes and decisions of same, and because the question of limitation is one which depends upon the law of the forum. R. C. S. of Texas, Art. 5545; Gautier vs. Franklin, 1 Texas, 732; Carrigan vs. Semple, 72 Texas, 306. We might cite numerous other authorities in this state and out of it holding that statutes of limitation relate only to the remedy, and are con-

trolled by the law of the forum irrespective of the place of the contract, but we consider this question too well settled to require further discussion.

It is contended by the insurance companies that the statutes of Mexico above quoted are more than mere statutes of limitation, but are statutes of prescription, operate not only to bar the right of recovery by limitation, but operate to kill the cause of action after the lapse of one year without filing suit. We are of the opinion that there is no difference or distinction to be drawn between statutes of limitation and statutes of prescription so far as the application of the rule that the law of the forum governs. R. C. S. of Texas, 1925, Art. 5545; Gautier vs. Franklin, 1 Texas, 732.

[fol. 230] However, even if it should be held that there is a distinction to be drawn between a prescriptive statute that kills the cause of action, and a statute of limitation that merely bars the right of recovery by limitation where limitation is pleaded, still in this case the result would be the same as it is shown that Dick removed from Mexico a few days after the boat in question was destroyed, and has lived in Texas ever since. Under such circumstances a prescriptive statute of Mexico would be no defense in the courts of Texas. 37 C. J., p. 732, Sec. 50, and notes; Ry. Co. vs. Mills, 116 S. W., 853 (Civ. App. writ ref'd).

We have treated the three articles of the Mexican code quoted as prescriptive statutes in the sense of operating to extinguish or kill the cause of action, which is more than a mere statute of limitation, though we do not know what construction has been placed thereon by the courts of that country. But regardless of whether they be mere statutes of limitation or statutes which operate to obliterate and kill, they come well within the provisions of Art. 5545 of our civil statutes, which prohibits any person, firm or corporation, etc., from entering into any character of contract or agreement by reason whereof the time in which to sue is limited to a shorter period than two years. If this statute can be avoided by making the contract kill the cause of action, instead of barring it by limitation, then it is a useless thing and amounts to nothing.

The insurance companies contend by their second assignment of error that if Article 5545 R. C. S. of Texas, 1925, be given the construction that it is applicable to a contract

[fol. 231] made under the laws of a foreign country containing a stipulation shortening the time for bringing the suit thereon to less than two years, such stipulation being valid under the laws of such foreign country, that it is unconstitutional, in that it would violate Article 1, Sec. 10, of the Constitution of the United States, in that it would thereby impair the obligation of a contract, and would violate the Fourteenth Amendment to the Constitution of the United States, in that it would deprive the defendant and the garnishees of property without due process of law.

Our answer to that is that it is well settled that parties have no constitutional rights in matters which are not a substantial part of the contract, but which refer to the remedy only. Statutes of limitation and agreed limitations have been uniformly held to affect the remedy only. Therefore, constitutional rights are not affected by a statute which shortens the limitation period or lengthens it unless the time to which the period of limitation is shortened is such that it practically deprives a party of property without due process of law. Campbell vs. Holt, 15 U. S. 620; 29 L. Ed. 483; Landa vs. Obert, 78 Tex., 46. In the above cited case the Supreme Court of the United States says:

"We are unable to see how a man can be said to have a property right in the bar of the statute as a defense to his promise to pay."

Of course had both parties remained in the Republic of Mexico until the bar of the statutes of that country had actually and fully operated, a different question would be presented; and, under the rule that where personal property is held adversely in one state for a sufficient length of time to acquire title thereto by prescription or limitation, such title will be recognized in other states, it might be that, under the statutes of Mexico, and the contract in question, this cause would be barred in Texas. 37 C. J., p. 732, [fol. 232] Sec. 50. No such question is presented in this case.

By proper assignment the insurance companies contend that the Court of Civil Appeals erred in holding that the trial court did not err in rendering judgment in favor of defendants in error and against the Mexican Company, and the two garnishees, because no judgment could be rendered

against the Mexican Company cited by publication, and a non-resident of Texas, unless there is a valid garnishment, and the garnishment could not be valid on the ground that there was an indebtedness of the garnishees to the Mexican Company until and unless a valid judgment was rendered against the Mexican Company, and, therefore, the garnishees were not subject to garnishment.

This assignment should be overruled. The record shows valid garnishments which impounded funds in this state in the hands of the two garnishees. These garnishees are insurance companies, doing business in Texas, having a permit from this state, and having local agents at Galveston, Texas, where they were served and have answered by reason of such service. Clearly, the test of jurisdiction for garnishment under all the authorities is whether or not the debtor (garnishee) is subject to suit at the hands of the creditors in the jurisdiction where the garnishment is sought. M. K. & T. Ry. Co. vs. Schwartz, 115 S. W. 275; Bingenheimer Merc. Co. vs. Weber, 191 N. W. 620, 27 A. L. R. 1395; Chicago R. I. & P. Ry. Co. vs. Strum, 174 U. S. 710, 43 L. Ed. 1144; Harris vs. Balk, 198 U. S. 414-428, 49 L. Ed. 1023; Louisville & N. Ry. Co. vs. Deer, 200 U. S. 177, 50 L. Ed. 426. It is also well settled that foreign insurance companies doing business by agents within a state are treated as residents of the state and debts due from them to non-residents are garnishable in the state where they are doing business. Louisville & Nashville Ry. Co. v. Deer, 200 U. S., 177, 50 L. Ed., 426; Lancashire Ins. Co. [fol. 233] vs. Corbetts, 165 Ill. 592, 36 L. R. A. 640, 56 Am. St. Rep. 275, 46 N. E. 631; National Fire Ins. Co. vs. Chambers, 53 N. J. Eq., 468, 32 Atl. 663; Fithian vs. New York & E. R. Co., 31 Pa. 114; Selma R. & D. R. Co. vs. Tyson, 48 Ga., 351; German Bank vs. American Fire Ins. Co., 83 Iowa, 32 Am. St. Rep. 316, 50 N. W. 53; Cousens vs. Lovejoy, 81 Me. 467, 17 Atl. 495; Burlington & M. River R. Co. vs. Thompson, 31 Kan. 194, 47 Am. St. Rep. 497, 1 Pac. 622.

In this connection it will be noted that the three insurance companies urge that there was no debt due from the two American companies to the Mexican Company. We cannot sustain this contention. The rule is that a debt arises between the original insurer and the re-insurer immediately upon the happening of a loss under an insurance

policy. Alimania Fire Ins. Co. vs. Fireman's Ins. Co., 209 U. S. 326, 52 L. Ed. 815. Also the boat being a total loss, the claim was liquidated and subject to garnishment. Of course the judgment against the Mexican Company cannot have the effect of a personal judgment, but is only a judgment in rem.

We recommend that the judgment of the Court of Civil Appeals be affirmed.

Richard Critz, Judge.

No. 5265

The Home Insurance Co., etc., Plaintiff in Error,

vs.

C. J. Dick et al., Defendants in Error

Judgment of the Court of Civil Appeals affirmed, as recommended by the Commission of Appeals.

C. M. Cureton, Chief Justice.

April 10, 1929.

[File endorsement omitted.]

[fols. 234-237] Motion for rehearing, covering four pages, filed April 24, 1929, omitted from this print. It was denied and nothing more by order June 12, 1929.

[fol. 238] In Supreme Court of Texas

[Title omitted]

Order Overruling Motion for Rehearing—June 12, 1929

It is ordered by the Court that the motion for rehearing herein by the plff. in error be overruled as recommended by the Commission of Appeals.

IN SUPREME COURT OF TEXAS

[Title omitted]

PETITION FOR APPEAL—Filed June 14, 1929

To the Honorable C. M. Cureton, Chief Justice of the Supreme Court of the State of Texas:

The petition of The Home Insurance Company and Franklin Fire Insurance Company respectfully shows:

1. On the 27th day of October, 1923, an action was filed in the District Court of Galveston County, State of Texas, for the Fifty-sixth Judicial District by C. J. Dick as Plaintiff against Compania General Anglo-Mexicana De Seguros, S. A., as defendant.

The suit was based upon an insurance policy alleged to have been issued by the defendant therein on or about the 18th day of March, 1921, insuring the Tubboat "R. Wav-
[fol. 239] erly" against loss by fire and other casualties and sought to recover the face value of said policy, namely Thirty-five thousand and 00/100 Dollars ($35,000.00) and interest.

2. On the same day, to wit, October 27th, 1923, the plaintiff in said cause, C. J. Dick, made application for writ of garnishment against these appellants as garnishees of said Compania General Anglo-Mexicana De Seguros, S. A., said garnishment proceeding being instituted in the District Court of Galveston County, State of Texas, for the fifty-sixth Judicial District, and numbered 39645 on the docket of said court.

3. In said garnishment proceeding these appellants, as such garnishees, answered on December 3rd, 1923, that they were not indebted to said Compania General Anglo-Mexicana De Seguros, S. A., and had none of its effects in their possession. Prior to the filing of such answer, Texas & Gulf Steamship Company and Suderman & Young, Inc., intervened in said cause and garnishment proceeding under leave of the court, and after such answer in garnishment was filed, a controverting affidavit was filed alleging that these appellants, as such garnishees, were indebted to said Compania General Anglo-Mexicana De Seguros, S. A. in

the sum of Fifteen thousand and 00/100 Dollars ($15,000.00) each, under certain re-insurance agreements entered into between them and said Compania General Anglo-Mexicana De Seguros, S. A., by which each of said garnishees re-insured Fifteen Thousand and 00/100 Dollars ($15,000.00) of the liability of said Compania General Anglo-Mexicana De Seguros, S. A. under said policy issued by it upon said Tugboat "R. Waverly."

4. It was alleged in said suits that the Tug "R. Waverly," had become a total loss by fire while in the harbor of Tampico, Mexico.

[fol. 240] 5. There was never any service of citation, or other process upon said Compania General Anglo-Mexicana De Seguros, S. A., except constructive service by publication, it being a non-resident of the State of Texas.

6. After the filing of the controverting affidavit to the garnishees' answers, these appellants, as such garnishees, filed an answer thereto denying that they were indebted to said Compania General Anglo-Mexicana De Seguros, S. A. in the sum of Fifteen Thousand and 00/100 Dollars ($15,000.00) each, alleging that they were entitled to urge in said proceeding any defenses to plaintiffs' suit that might have been urged by said Compania General Anglo-Mexicana De Seguros, S. A., and pleading in bar of plaintiffs' suit that the policy sued upon provided as follows: "It is understood and agreed that no judicial suit or demand shall be entered before any tribunal for the collection of any claim under this policy, unless such suits or demands are filed within one year counted as from the date on which such damage occurs." That said policy was issued in the Republic of Mexico and that the above quoted provision thereof was valid and enforcible under the laws of Mexico; that the contract was performable and intended to be performed in Mexico, and that the clause above quoted was valid as a defense to any suit brought to recover on said policy after the expiration of one year from the date of the accrual of the cause of action or damage to the vessel; that the suit was not filed within one year, and such policy provision was pleaded in defense of plaintiffs' and intervenors' suit. Appellants, as such garnishees, further provided that said insurance policy was executed in the Republic of Mexico,

was intended to be performed in the Republic of Mexico, and was subject to the laws of the Republic of Mexico, and [fol. 241] pleaded certain provisions of the Commercial Code of the Republic of Mexico, which it was alleged were in force at the time of the issuance of said policy and at the time of the accrual of plaintiffs' cause of action, as follows:

Article 1038. "The rights of action derived from commercial acts shall be subject to prescription in accordance with the provisions of this code."

Article 1039. "The periods fixed for the enforcement of rights of action arising out of commercial acts shall be fatal, except restitution against same is given."

Article 1043. "One year shall prescribe actions derived from contracts of life insurance, sea and land."

That under the above quoted provisions of the Mexican Law, the cause of action asserted by plaintiff was barred, and that no suit was instituted thereon within such one year period, nor were the garnishment proceedings sued out within any such period.

7. To the said answer of the garnishees, the plaintiff filed a general demurrer based upon:

(a) Because the portions of said answer setting up the contractual provisions of the policy do not form a portion of the cause of action;

(b) Because the statute of the State of Texas prohibits a contractual limitation of less than two years.

(c) Because said matters are in violation of the public policy of the State of Texas and void in a Texas court.

8. Upon hearing of the foregoing demurrer, the District Court of Galveston County sustained the same and held that the contractual provisions of the policy above quoted and the provisions of the Mexican Commercial Code above set out constituted no defense to this proceeding, because of the provisions of Article 5535 of the Revised Civil Statutes of Texas of 1925, (which was continuously in force [fol. 242] at all of the times herein mentioned) and which reads as follows:

"No person, firm, corporation, association or combination of whatsoever kind, shall enter into any stipulation,

contract, or agreement, by reason whereof the time in which to sue thereon is limited to a shorter period than two years. And no stipulation, contract or agreement for any such shorter limitation in which to sue shall ever be valid in this State."

Said District Court held further that said Article 5545 of the Revised Civil Statutes of Texas, 1925, was not in conflict with either Section 10 of Article I of the Constitution of the United States, or the Fourteenth Amendment to the Constitution of the United States, and refused to allow these apellants as such garnishees to introduce evidence in support of their said pleadings. Upon final hearing, judgment was rendered by the said District Court of Galveston County, Texas, in said Cause No. 39643, in favor of the Plaintiff, C. J. Dick, for Seventeen thousand, five hundred and eighty-seven and 50/100 Dollars ($17,587.50) and in favor of the Intervenors, Texas & Gulf Steamship Company and Suderman & Young, Inc., for Nineteen thousand, eighty-seven and 50/100 Dollars ($19,087.50) against said Compania General Anglo-Mexicana De Seguros, S. A., together with interest thereon from July 26th, 1927, the date of said judgment, at the rate of six (6) per cent per annum, and judgment was rendered in said garnishment proceeding (the main cause and the said garnishment proceeding having been tried together as one cause) in favor of the plaintiff, C. J. Dick, and the Intervenors, Texas & Gulf Steamship Company and Suderman & Young, Inc., against The Home Insurance Company, as such garnishee, for Eighteen Thousand, Three Hundred and Thirty-seven and 50/100 Dollars ($18,337.50), and against Franklin Fire Insurance Company for the same amount, each of said [fol. 243] amounts to bear interest at six (6) per cent per annum from the date of said judgment, namely, July 26th, 1927.

9. Thereafterwards, on the 11th day of August, 1927, these appellants and said Compania General Anglo-Mexicana De Seguros, S. A., duly perfected their appeals from the said judgments to the Court of Civil Appeals of Texas for the First Supreme Judicial District, sitting at Galveston, these appellants giving supersedeas bonds each in the sum of Forty-thousand and 00/100 Dollars ($40,000.00), in

order to supersede judgment, and said Compania General Anglo-Mexicana De Seguros, S. A. filing an appeal bond in the nature of a cost bond from said judgment.

10. Thereafterwards said appeal coming on to be duly heard in said Court of Civil Appeals, and on the 3rd day of May, 1928, said court entered its judgment and filed its opinion affirming the judgment of the District Court of Galveston County, Texas, and sustaining the validity of said Article 5545 of the Revised Civil Statutes of Texas of 1925, as against the claim of these appellants, that the same was in violation of and contrary to Section 10 of Article 1 of the Constitution of the United States and the Fourteenth Amendment to the Constitution of the United States, said decision being in favor of the validity of said statute.

11. Afterwards these appellants seasonably filed a motion for rehearing in said Court of Civil Appeals, which having been considered by said court, was overruled by said Court on May 24th, 1928.

12. Thereafterwards, within the time limited by the time permitted by the statutes of the State of Texas, these appellants and said Compania General Anglo-Mexicana De Seguros, S. A., duly filed their petition for writ of error from the Supreme Court of Texas to said Court of Civil [fol. 244] Appeals, and on the 23rd day of January, 1928, said writ of error was granted by the Supreme Court of Texas.

13. Thereafterwards, the said Supreme Court of Texas referred said case for hearing and submission to Section A of the Commission of Appeals of the State of Texas, and on the 13th day of March, 1929, the said cause was submitted to and heard by said Commission of Appeals of the State of Texas.

14. Thereafterwards, on April 10th, 1929, the Supreme Court of the State of Texas entered its judgment, order and decree affirming the judgments of the District Court of Galveston County, Texas, and of the Court of Civil Appeals above referred to upon the recommendation of an opinion of said Section A of said Commission of Appeals, and holding thereby that Article 5545 of the Revised

Civil Statutes of Texas, 1925, was not in violation of Section 10 of Article I of the Constitution of the United States, or of the Fourteenth Amendment to the Constitution of the United States, and sustaining the validity of said statute in this suit, in which the validity of said statute had been drawn in question on the ground of its being repugnant to the Constitution of the United States.

15. Thereafterwards, in due course, these appellants filed their motion for rehearing of this cause in said Supreme Court of Texas, which after having been duly submitted, was overruled by said Supreme Court of Texas on the 12th day of June, 1929.

16. That said Supreme Court of Texas is the Highest Court of the State of Texas in which a decision in this suit can be had, and therein and in said Court of Civil Appeals and in said District Court these appellants drew in question the validity of a statute of the State of Texas [fol. 245] to-wit, Article 5545 of the Revised Civil Statutes of the State of Texas, 1925, on the ground of its being repugnant to the Constitution of the United States, and the decision of said courts was in favor of its validity.

17. Wherefore these appellants, your petitioners, conceiving themselves aggrieved by the order of affirmance of said judgment entered on April 10th, 1929, in the above proceeding, do hereby appeal from said order and judgment to the Supreme Court of the United States under the provisions of United States Code, Title 28, Section 344 (Judicial Code, Section 237, as amended), on the ground that the decision of the Supreme Court of the State of Texas was a decision in which the validity of a statute of the State of Texas was drawn in question on the ground that it was repugnant to the Constitution and laws of the United States and the decision of said court was in favor of the validity of the said statute of the State of Texas, and these appellants do hereby appeal from said order and decision of the Supreme Court of the State of Texas to the Supreme Court of the United States, and they pray that this their appeal may be allowed; and that a transcript of the record and proceedings and papers upon which said order and judgment was made, duly authenticated, may be sent to the Supreme Court of the United States. There accom-

panies this petition for appeal an assignment of errors, and it is prayed that an order be entered fixing the amount of the security which the appellants shall give in order to supersede said judgment or order of the Supreme Court of Texas, and that these appellants may have such other [fol. 246] and further relief in the premises as may be just.

Terry, Cavins & Mills, Attorneys for the Home Insurance Company and Franklin Fire Insurance Company.

Duly sworn to by Ballinger Mills. Jurat omitted in printing.

Read on petition for appeal this the 14th day of June, 1929.

C. M. Cureton, Chief Justice of the Supreme Court of the State of Texas.

[File endorsement omitted.]

[fol. 247] IN SUPREME COURT OF TEXAS

[Title omitted]

ORDER GRANTING APPEAL—Filed June 14, 1929

Upon this, the 14th day of June, 1929, there came on to be heard the petition of The Home Insurance Company and Franklin Fire Insurance Company for appeal of the above numbered and entitled cause from the Supreme Court of the State of Texas to the Supreme Court of the United States, and upon examination of the petition for appeal, the assignment of errors and the record in such matter, it is hereby ordered that the appeal in the above entitled cause to the Supreme Court of the United States be, and it is hereby allowed, as prayed, and that upon the filing of a bond conditioned as required by law, and in accordance with the Statutes of the United States, and the rule of the Supreme Court of the United States in the sum of Five Thousand and no/100 ($5,000.00) to be approved by the Clerk of this Court, the judgment hereby appealed from shall be superseded and execution thereon stayed subject to the deter-

mination of this case by said Supreme Court of the United States.

It is further ordered that citation on appeal be issued by the Clerk of this court and certified according to law, and that a true copy of the record, assignment of errors, and all [fol. 248] proceedings in this cause be transmitted to the Supreme Court of the United States, duly certified according to law, in order that the Supreme Court of the United States may inspect the same and take such action thereon as it may deem proper.

Dated at Austin, Texas, the 14th day of June, 1929.

C. M. Cureton, Chief Justice of the Supreme Court of the State of Texas.

[File endorsement omitted.]

IN SUPREME COURT OF TEXAS

[Title omitted]

ASSIGNMENT OF ERRORS—Filed June 14, 1929

Now comes The Home Insurance Company and Franklin Fire Insurance Company, Appellants in the above numbered and entitled cause, and in connection with their petition for appeal to the Supreme Court of the United States, make and file their Assignment of Errors, as follows:

First. The Supreme Court of the State of Texas in deciding that Article 5543 of Revised Civil Statutes of the State of Texas applied to the contract of insurance made between C. J. Dick and Compania General Anglo-Mexicana De Seguros S. A., in Mexico, and covering the boat "Waverly R," located in Mexico, erred in that the statute so applied [fol. 249] impairs the obligation of a contract in violation of Article 1, Section 10, Clause 1, of the Constitution of the United States, whereby was drawn in question the validity of a statute of the State of Texas on the ground of its being repugnant to the Constitution of the United States and the decision is in favor of its validity.

Second. The Supreme Court of the State of Texas in deciding that Article 5545 of Revised Civil Statutes of the

State of Texas applied to the contract of insurance made between C. J. Dick and Compania General Anglo-Mexicana De Seguros S. A., in Mexico, and covering the boat "Waverly R," located in Mexico, erred in that the statute so applied deprives the appellants of liberty and property without due process of law in violation of Amendment 14, Section 1 of the Constitution of the United States, whereby was drawn in question the validity of a statute of the State of Texas on the ground of its being repugnant to the Constitution of the United States and the decision is in favor of its validity.

Third. The Supreme Court of the State of Texas erred in not rendering judgment in favor of appellants because said Article 5545 of the Revised Civil Statutes of the State of Texas as applied to the contract of insurance made between C. J. Dick and Compania General Anglo-Mexicana De Seguros S. A., in Mexico, and covering the boat "Waverly R.", located in Mexico, and as applied to appellants is unconstitutional and void and in conflict with and in violation of Article 1, Section 10, Clause 1, of the Constitution of the United States and in conflict with and in violation of Amendment 14, Section 1 of the Constitution of the United States, whereby was drawn in question the validity of a statute of the State of Texas on the ground of its being re-
[fol. 250] pugnant to the Constitution of the United States and the decision is in favor of its validity.

Fourth. The Supreme Court of the State of Texas erred in holding that under the construction given by it to Article 5545 of the Revised Civil Statutes of Texas, 1925, the same is not violative of Article I, Section 10, of Clause 1 of the Constitution of the United States.

Fifth. The Supreme Court of Texas erred in holding that under the construction given by it to Article 5545 of the Revised Civil Statutes of Texas, 1925, the same is not violative of the Fourteenth Amendment to the Constitution of the United States.

Terry, Cavin & Mills, Attorneys for the Home Insurance Company and Franklin Fire Insurance Company, Appellants.

Read on petition for appeal this, the 14th day of June, 1929.

C. M. Cureton, Chief Justice of the Supreme Court of the State of Texas.

[File endorsement omitted.]

[fol. 251] Stipulation of counsel as to amount of supersedeas bond omitted in printing.

[fols. 252 & 253] Supersedeas bond on appeal for $5,000.00, approved and filed June 17, 1929, omitted in printing.

[fol. 254-255] Citation, in usual form, showing service on J. L. Darrouzet et al., filed June 17, 1929, omitted in printing.

[fol. 256] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 257] SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF THE PARTS OF THE RECORD TO BE PRINTED—Filed July 24, 1929

Come now the appellants in the above entitled cause and state that the points upon which they intend to rely in this case are as follows:

1. That the Supreme Court of the State of Texas erred in finding and holding that the State of Texas could by statute (viz: Article 5545 of the Revised Civil Statutes, 1925, of the State of Texas) authorize, or confer jurisdiction upon, the courts of Texas to change the terms, or delete the clear provisions, of a contract of insurance made and to be performed in Mexico, insuring a vessel located

in Mexico, and valid under the laws of Mexico, which contract, when made, was between two parties neither of whom was a citizen or resident of Texas; because such statute is invalid as repugnant to Paragraph 1 of Section 10 of Article I of the Constitution of the United States in that [fol. 258] it impairs the obligation of the said contract in violation of the said article of the Constitution of the United States.

2. That the Supreme Court of the State of Texas erred in finding and holding that the state of Texas could by statute (viz: Article 5545 of the Revised Civil Statutes, 1925, of the State of Texas) authorize, or confer jurisdiction upon, the courts of Texas to change the terms, or delete the clear provisions, of a contract of insurance made and to be performed in Mexico, insuring a vessel located in Mexico, and valid under the laws of Mexico, which contract, when made, was between two parties neither of whom was a citizen or resident of Texas; because such statute is invalid as repugnant to Section 1 of Article XIV of the Amendments of the Constitution of the United States in that it deprives the appellants of their property without due process of law and denies to them the equal protection of the laws in violation of the said Fourteenth Amendment of the Constitution of the United States.

3. That the Supreme Court of the State of Texas erred in applying and enforcing Article 5545 of the Revised Civil Statutes, 1925, of the State of Texas, being a state statute of limitations of general scope, against the express terms of the contract of insurance made between C. J. Dick and Compania General Anglo-Mexicana de Seguros, S. A., which contract was validly made in Mexico, covered a vessel located in Mexico, and was to be performed outside of the State of Texas; because the said statute as so ap- [fol. 259] plied and enforced is invalid as repugnant to Paragraph 1 of Section 10 of Article I of the Constitution of the United States in that it impairs the obligation of the said contract in violation of the said article of the Constitution of the United States.

4. That the Supreme Court of the State of Texas erred in applying and enforcing Article 5545 of the Revised Civil Statutes, 1925, of the State of Texas, being a state

statute of limitations of general scope, against the express terms of the contract of insurance made between C. J. Dick and Compania General Anglo-Mexicana de Seguros, S. A., which contract was validly made in Mexico, covered a vessel located in Mexico, and was to be performed outside of the State of Texas; because the said statute as so applied and enforced is invalid as repugnant to Section 1 of Article XIV of the Amendments of the Constitution of the United States, in that it deprives the appellants of their property without due process of law and denies to them the equal protection of the laws in violation of the said Fourteenth Amendment of the Constitution of the United States.

5. That the Supreme Court of the State of Texas erred in holding that the State of Texas by statute providing for garnishee process could constitutionally acquire jurisdiction over the appellants, The Home Insurance Company and Franklin Fire Insurance Company, corporations of the State of New York, for the adjudication of the liability of those appellants to Compania General Anglo-Mexicana de Seguros, S. A. under executory contracts of reinsurance, made and to be performed in Mexico and relating exclusively to property permanently situated in [fol. 260] Mexico, such contracts not having been entered into the course of the transaction of business in Texas by any insurance company party thereto; because such statute deprives the appellants, The Home Insurance Company and Franklin Fire Insurance Company, corporations of the State of New York, of their property without due process of law in violation of Section 1 of Article XIV of the Amendments of the Constitution of the United States.

6. That the Supreme Court of the State of Texas erred in holding that the State of Texas could, by statute providing for garnishee process, create a legal interest or privity in such contracts of reinsurance in favor of C. J. Dick, a citizen of the State of Texas, appellee herein, so that the judicial process of the courts of Texas might be used to adjudicate herein the liability of Compania General Anglo-Mexicana de Seguros, S. A. to the appellee, a citizen of Texas, under an insurance contract between those parties, and in addition adjudicate herein the liability of the appellants, The Home Insurance Company and Franklin Fire Insurance Company, New York corporations, to Compania

General Anglo-Mexicana de Seguros, S. A. under said reinsurance contracts, and upon such double adjudications herein satisfy the first of such liabilities out of property which might be found in the control of agents of the New York insurance companies in Texas; because such statute deprives the appellants, New York insurance companies, of their property without due process of law in violation of Section 1 of Article XIV of the Amendments of the Constitution of the United States.

[fol. 261] And the appellants further state that only the following parts of the record as filed in this court need be printed by the clerk for the hearing of the case:

Title of paper	Record page
Caption of proceedings in the Supreme Court of the State of Texas	3
Plaintiff's original petition	5
Order of court appointing attorney to represent absent defendant cited by publication	7
Defendant's original answer	8
Plaintiff's general demurrer	11
Judgment, notice of appeal and allowing 90 days to file statement of facts and bills of exceptions	12
Findings of facts and conclusions of law	14
Appeal bond	17
Affidavit for garnishment	32
Order of court granting Texas & Gulf Steamship Company and Suderman & Young leave to intervene for their interest	33
Intervention of Texas & Gulf Steamship Company and Suderman & Young	33
Original answer of The Home Insurance Company	36
Original answer of Franklin Fire Insurance Company	38
Controverting affidavit of plaintiff, C. J. Dick	41
Controverting affidavit of plaintiff, C. J. Dick	43
Answer of garnishees to plaintiff's controverting plea	45
Plaintiff's general demurrer	48
Judgment, notice of appeal and allowing 90 days to file statement of facts and bills of exceptions	49
Findings of fact and conclusions of law	51

Title of paper	Record page
[fol. 262] Appeal bond of defendant, The Home Insurance Company	54
Appeal bond of defendant, Franklin Fire Insurance Company	61
Garnishees' assignments of error	69
Exhibit, insurance policy	91
Exhibit, insurance policy	94-106 inc.
Judgments of Court of Civil Appeals	176
Opinion of Court of Civil Appeals	178
Motion for rehearing of appellants	194
Order overruling motion	199
Petition for writ of error	200
Order refusing writ	219
Motion for rehearing of application for writ of error	220
Order granting motion for rehearing	224
Judgment of Supreme Court	225
Opinion of Supreme Court	226
Motion for rehearing of plaintiffs in error	234
Order of Supreme Court overruling motion	238
Petition for appeal	238
Order of the Chief Justice of Supreme Court of Texas granting appeal	247
Assignment of errors	248
Stipulation of counsel as to amount of supersedeas bond	251
Supersedeas bond on appeal to Supreme Court of the United States	252
Citation on appeal, together with waiver of service thereof	254
Certificate of clerk	256

New York, July 23, 1929.

David Rumsey, Counsel for Appellants.

[fols. 263 & 264] Service of a true copy of the above and foregoing is this day acknowledged.

July —, 1929.

—— ——, Counsel for C. J. Dick.

[fol. 265] Affidavit of Service

STATE OF NEW YORK,
County of New York, ss:

Mark W. Maclay, being duly sworn, deposes and says:

I am a partner of David Rumsey, the counsel for the appellants herein. I am a member of the bar of this Court.

This case was duly docketed in the Clerk's Office of this Court on July 11, 1929.

On the 23rd day of July, 1929, at 11:20 o'clock A. M. in time to reach the counsel for the appellees within the fifteen day period prescribed by paragraph 9 of Rule 13 of the Rules of this Court, I served the annexed statement of the points to be relied upon and the designation of the parts of the record to be printed upon Lockhart, Hughes & Lockhart, Esq., counsel for the appellees herein, by depositing a true copy thereof in the United States Mail at the branch post-office known as the Wall Street branch, [fols. 266 & 267] Borough of Manhattan, New York City, the same being one of the regular branch post-offices of the New York City General Post-Office, enclosed in a securely closed wrapper with the postage thereon prepaid and registered, addressed to said counsel at their office, Suite 718, American National Insurance Building, Galveston, Texas, that being the address designated by them in the last papers served by them herein.

The reason that proof of service is made by affidavit, and not by admission of service by the counsel for the appellees herein, is that the office of David Rumsey is at #44 Wall Street, New York City, N. Y., and that of Lockhart, Hughes & Lockhart, counsel for the appellees, at Suite 718, American National Insurance Building, Galveston, Texas, and time did not permit the preparation of the statement of the points to be relied upon and the designation of the parts of the record to be printed, the mailing of the original thereof to Lockhart, Hughes & Lockhart, at Suite 718, American National Insurance Building, Galveston, Texas, and its return to said David Rumsey with admission of service, in time to be filed with this Court by July 26, 1929, the date of the expiration of said fifteen day period.

Mark W. Maclay.

Sworn to before me this 23rd day of July, 1929. Harding Cowan, Notary Public, New York Co., 223. New York County Register's No. 10214. Kings County Clerk's No. 65. Kings County Register's No. 1280. Commission expires March 30, 1931. (Seal of Harding Cowan, Notary Public, New York County.)

[fol. 268] [File endorsement omitted.]

Endorsed on cover: File No. 34,363. Texas Supreme Court. Term No. 232. The Home Insurance Company and Franklin Fire Insurance Company, appellants, vs. C. J. Dick, Texas & Gulf Steamship Company, and Suderman & Young, Inc. Filed July 11, 1929. File No. 34,363.